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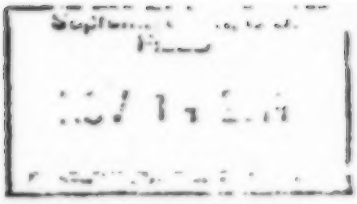

In the Supreme Court of the United States

APRIL DEBOER, *et al.*,

Petitioners,

v.

RICHARD SNYDER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state violates the Fourteenth Amendment to the U.S. Constitution by denying same-sex couples the right to marry.

PARTIES TO THE PROCEEDING

Petitioners are APRIL DEBOER, individually and as parent and next friend of N.D.-R., R.D.-R., and J.D.-R., minors, and JAYNE ROWSE, individually and as parent and next friend of N.D.-R., R.D.-R., and J.D.-R., minors.

Respondents are: RICHARD SNYDER, in his official capacity as Governor of the State of Michigan, and BILL SCHUETTE, in his official capacity as Michigan Attorney General.

The only other party to the litigation was the Oakland County, Michigan, Clerk, initially BILL BULLARD, JR., and later LISA BROWN, as the result of a local election while the case was pending in the district court. Clerk BROWN did not appeal the district court judgment.

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PETITION FOR WRIT OF CERTIORARI

Petitioners APRIL DEBOER, individually and as parent and next friend of N.D.-R., R.D.-R., and J.D.-R., minors, and JAYNE ROWSE, individually and as parent and next friend of N.D.-R., R.D.-R., and J.D.-R., minors, respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reproduced in the appendix to the petition (Pet. App. 1–102). It is not published in the *Federal Reporter* but is available at 2014 WL 5748990. The district court's conclusions of law and findings of fact (Pet. App. 103-139) are reported in *DeBoer v. Snyder*, 973 F.Supp. 2d 757 (E.D. Mich. 2014).

JURISDICTION

The court of appeals entered judgment on November 6, 2014 (Pet. App. 142). The Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, § 1

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Const. 1963, art. 1, § 25

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

Mich. Comp. Laws § 551.1

> Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

Mich. Comp. Laws § 551.2

> So far as its validity in law is concerned, marriage is a civil contract between a man and a woman, to which the consent of parties capable in law of contracting is essential. Consent alone is not enough to effectuate a legal marriage on and after January 1, 1957. Consent shall be followed by obtaining a license as required by section 1 of Act No. 128 of the Public Acts of 1887, being section 551.101 of the Michigan Compiled Laws, or as provided for by section 1 of Act No. 180 of the Public Acts of 1897, being section 551.201 of the Michigan Compiled Laws, and solemnization as authorized by sections 7 to 18 of this chapter.

Mich. Comp. Laws § 551.3

> A man shall not marry his mother, sister, grandmother, daughter, granddaughter, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister, mother's sister, or cousin of the first degree, or another man.

Mich. Comp. Laws § 551.4

> A woman shall not marry her father, brother, grandfather, son, grandson, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother, mother's brother, or cousin of the first degree, or another woman.

Mich. Comp. Laws § 551.271

> (1) Except as otherwise provided in this act, a marriage contracted between a man and a woman who are residents of this state and who were, at the time of the marriage, legally competent to contract marriage according to the laws of this state, which marriage is solemnized in another state within the United States by a clergyman, magistrate, or other person legally authorized to solemnize marriages within that state, is a valid and binding marriage under the laws of this state to the same effect and extent

> as if solemnized within this state and according to its laws.
>
> (2) This section does not apply to a marriage contracted between individuals of the same sex, which marriage is invalid in this state under section 1 of chapter 83 of the revised statutes of 1846, being section 551.1 of the Michigan Compiled Laws.

Mich. Comp. Laws § 551.272

> This state recognizes marriage as inherently a unique relationship between a man and a woman, as prescribed by section 1 of chapter 83 of the revised statutes of 1846, being section 551.1 of the Michigan Compiled Laws, and therefore a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction.

INTRODUCTION

This case presents the question of whether a state may constitutionally deny same-sex couples the right to marry the person of their choice. The right to marry is a fundamental freedom, *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), that encompasses the right "to establish a home", to "bring up children," and "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free persons." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Sixth Circuit held that Michigan's decision to prohibit same-sex couples from marrying accords with the due process and equal protection guarantees of the Fourteenth Amendment.

Petitioners are a same-sex couple who sued on behalf of themselves and their three young children. They are barred under Michigan law not only from marrying each other but also from jointly adopting their children because Michigan permits only married persons to adopt children as a couple.

There is no dispute that the question raised here is of paramount importance. Respondents have advised counsel that they will file a response in this Court indicating that they do not oppose a grant of certiorari. Although prior circuit court rulings found that laws banning marriage by same-sex couples violate the Fourteenth Amendment, the Sixth Circuit disagreed. Gay and lesbian citizens in Michigan, Ohio, Kentucky, and Tennessee are denied the fundamental freedom and equal right to marry, and their families are deprived of the status, dignity, security, and stability that marriage brings. This Court should grant the petition and hold that prohibiting same-sex couples from joining in marriage violates our nation's most cherished and essential guarantees.

STATEMENT OF THE CASE

A. Petitioners

April DeBoer and Jayne Rowse, both nurses,[1] are in a long-term, committed relationship and seek to marry. They are both state-licensed foster parents and, as the State stipulated, "responsible and caring parents who are providing a stable and loving home for their

---

[1] DeBoer works as a nurse in a hospital neonatal unit tending to newborns with medical problems. Rowse works as a nurse in a hospital emergency (ER) unit. Pet. App. 105.

children." Stipulated Facts (No. 12-10285) (ECF 168, Pg ID 4736); see also *DeBoer*, Pet. App. 105. DeBoer and Rowse brought three children into their family: their daughter, "R", who was adopted singly by DeBoer, and sons, "N" and "J", who were adopted singly by Rowse. Although they are a family, Michigan law bars the mothers from adopting jointly. As a result, each child has only one legally recognized parent.

All three children were born to mothers with serious challenges, and two of the three children qualified as "special needs". *DeBoer*, Pet. App. 73-74 (Daughtrey, J., dissenting). N was born on January 25, 2009, and his mother subsequently surrendered her legal rights to him. Petitioners volunteered to care for the boy and brought him into their home following his birth. In November 2009, Rowse completed the necessary steps to adopt N legally. *Id.* at 73.

"[D]espite the uphill climb the baby faced," Rowse also legally adopted J after DeBoer and Rowse first served as foster parents and legal guardians for him. *Id.* at 73-74. J was born on November 9, 2009, premature at 25 weeks. At birth, he weighed 1 pound, 9 ounces, and tested positive for marijuana, cocaine, opiates and methadone. His birth mother abandoned him immediately after delivery. J remained in the hospital Neonatal Intensive Care Unit for four months with multiple health complications, and he was not expected to live. If he survived, he was not expected to be able to walk, speak or function on a normal level in any capacity. His condition required around-the-clock care from DeBoer and Rowse and other skilled therapists. *Id.* at 74.

Their third child, R, was born on February 1, 2010, to a nineteen year-old woman who had received no prenatal care and who gave birth at her mother's home before bringing the infant to the hospital where DeBoer worked. R experienced issues related to her lack of prenatal care, including delayed gross motor skills. She needed a physical therapy program to address these problems. Pet. App. 74.

With DeBoer and Rowse's skilled and loving care, all three children are now thriving.

B. Michigan's Marriage Prohibition

For many years prior to 1996, Michigan law defined eligibility to marry without reference to gender. With the possibility that other states might allow marriage between same-sex couples,[2] in 1996, the legislature enacted Mich. Comp. Laws § 551.1, which identifies marriage as "inherently a unique relationship between a man and a woman", and amended Mich. Comp. Laws §§ 551.1-.4 to specify that eligibility to marry is limited to "a man and a woman." 1996 Mich. Pub. Acts 334.

In 2004, after Massachusetts began allowing same-sex couples to marry,[3] a voter initiated constitutional amendment passed at the ballot in Michigan. The Michigan Marriage Amendment [MMA], Mich. Const. 1963, art. 1, § 25, which eliminated the possibility of legislatively repealing the marriage exclusion, provides:

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[2] See, *e.g.*, *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

[3] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

The MMA not only denies same-sex couples the freedom to marry, it precludes recognition of marriages performed outside the state. It also deprives same-sex couples and their children of countless rights, protections, and duties under Michigan and federal law, "from the mundane to the profound." *United States v. Windsor*, 133 S.Ct. 2675, 2694 (2013).

C. Procedural History

DeBoer and Rowse initially brought this action as a challenge to Mich. Comp. Laws. § 710.24, which permits married and single persons to adopt but precludes unmarried couples from adopting each other's children, so that both could be the child's legal parents. They later amended their complaint to add a challenge to the MMA and related statutes on due process and equal protection grounds.

After the district court denied the State's motion to dismiss and the parties' cross-motions for summary judgment, the case proceeded to trial. Petitioners offered uncontradicted evidence as to (1) the history and ongoing legacy of discrimination against gays and lesbians in the United States and in Michigan, (2) the history, purposes, and evolution of marriage and eligibility to marry in the United States, (3) the harms suffered by the children of same-sex couples as a result of their parents' exclusion from marriage, (4) the

demographics of gay and lesbian families in the United States and in Michigan, and (5) the harms suffered by children in Michigan's foster care system who remain in foster care solely because same-sex couples are prohibited from adopting jointly. Petitioners and Respondents presented expert testimony on the central issue of the trial – whether or not there is a scientific consensus that children raised by same-sex couples have comparable outcomes to children raised by opposite-sex couples.

After a nine-day trial, the district court concluded that the Michigan's exclusion of same-sex couples from marriage violates equal protection because it is not rationally related to the advancement of "any conceivable legitimate state interest." Pet. App. 123.[4] While finding it unnecessary to reach the due process claim, the district court noted that "the Supreme Court has repeatedly recognized marriage as a fundamental right." Pet. App. 124.

In arriving at its decision, the district court addressed and rejected each of the State's asserted rationales, finding that (1) there is "no logical connection between banning same-sex marriage and providing children with an 'optimal environment' or achieving 'optimal outcomes'," Pet. App. 127-131; (2) any interest in "proceeding with caution" is "insufficient as it could be raised in any setting, and the state must have some rationale beyond merely

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[4] The district court did not entertain arguments on heightened scrutiny, instead directing the parties to address a narrow legal issue: whether the MMA survives rational basis review. Pet. App. 125-126.

asserting there is no conclusive evidence to decide an issue," Pet. App. 131-132; (3) "tradition and morality are not rational bases for the MMA," Pet. App. 132-134; and (4) principles of federalism cannot justify the MMA because states' authority over marriage is subject to constitutional limitations. Pet. App. 134-138. The district court, therefore, enjoined the Respondents from enforcing the MMA and related statutes. Pet. App. 141.

The Governor and the Attorney General appealed the district court's order and obtained a stay of the injunction by the Sixth Circuit pending appeal. .

In a 2-1 decision, the Sixth Circuit reversed the district court's decision. The majority held that –

> (1) this Court's summary affirmance in *Baker v. Nelson*, 409 U.S. 810 (1972), was binding on the court and no other decisions of this Court constituted doctrinal developments sufficient to depart from *Baker*. Pet. App. 22-28 (discussing *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S.Ct. 2675 (2013));
>
> (2) regardless whether courts have the power to decide whether the Fourteenth Amendment prohibits a definition of marriage like Michigan's, "in this instance," it is "better" "to allow change through the customary political process," Pet. App. 67;
>
> (3) the applicable standard of review is rational basis, Pet. App. 31-32, and the "responsible procreation" and "wait-and-see" justifications satisfy that standard, Pet. App. 31-38, even though "gay couples, no less than

straight couples, are capable of raising children and providing stable families for them," Pet. App. 33-34; and

(4) while the right to marry is a fundamental right, the right of same-sex couples to marry is not encompassed within that right, Pet. App. 45-47.

The dissenting member of the panel, Judge Daughtrey, disagreed in every respect. Pet. App. 68-102. For example, the judge would have found that, in light of subsequent doctrinal developments, *Baker* is no bar to striking down the challenged provisions as violative of the due process and equal protection clauses. Pet. App. 83-90. As to the central issue at trial, she also noted, *inter alia*, that the testimony "clearly refuted the proposition that, all things being equal, same-sex couples are less able to provide for the welfare and development of children. Indeed, marriage, whether between same-sex or opposite-sex partners, increases stability within the family unit," Pet. App. 82. As to the child outcome rationales, the dissenting judge also found that Michigan law "allows heterosexual couples to marry even if the couple does not wish to have children, even if the couple does not have sufficient resources or education to care for children, even if the parents are pedophiles or child abusers, and even if the parents are drug addicts." Pet. App. 82.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THE FOURTH, SEVENTH, NINTH, AND TENTH CIRCUITS.

The Sixth Circuit's decision upholding Michigan's ban has now created a conflict among the federal courts of appeals warranting certiorari review under this Court's Rule 10(a).

Prior to the Sixth Circuit's decision, every circuit to pass on this question concluded that the Constitution cannot tolerate laws that bar same-sex couples from marrying. Their rationales varied, but the outcomes were uniform. *Latta v. Otter*, Nos. 14-35420, 14-35421, 12-17668, 2014 WL 4977682 (9th Cir. Oct. 7, 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S.Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S.Ct. 308, (2014) *and sub nom. McQuigg v. Bostic*, 135 S.Ct. 314 (2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014), *cert. denied*, *Herbert v. Kitchen*, 135 S.Ct. 265 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S.Ct. 271 (2014).

The Sixth Circuit's opposite conclusion disputes the rationales for decision adopted by its sister circuits.[5]

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[5] The Sixth Circuit's conclusion that Petitioners' challenge is precluded by *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed,* 409 U.S. 810 (1972), conflicts with the conclusions of all four other circuits on this point. See, *e.g.*, *Kitchen,* 755 F3d at 1204-1208; *Bostic,* 760 F.3d at 373-374; *Latta*, 2014 WL 4977682, at *3; *Baskin* , 766 F.3d at 660. *Baker* is, of

A. Federalism and the Democratic Process.

In conflict with its sister circuits, the Sixth Circuit concluded that it is constitutionally permissible in this instance for the judicial branch to abdicate to the political process the duty to protect constitutional rights. The Sixth Circuit suggested it was presumptuous for courts to decide what fundamental rights are enshrined within the Constitution, as it is preferable for the electorate to come to such decisions on its own. Pet. App. 60-61. In contrast, the Tenth Circuit in *Kitchen* refused to uphold a state ban on marriage by same-sex couples simply because the state preferred changes to come through the political process. While the State favored the political process over judicial resolution in part to "reduc[e] the potential for civic strife," the Tenth Circuit was cognizant of its role to enforce constitutional guarantees: "public opposition cannot provide cover for violation of fundamental rights." 755 F.3d at 1227. In *Bostic*, 760 F.3d at 379-80, the Fourth Circuit found that "*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates [the admonition in *Loving v. Virginia*, 388 U.S. 1 (1967),] that the states must exercise their authority without trampling constitutional guarantees. Virginia's federalism-based interest in defining marriage therefore cannot justify its encroachment on the fundamental right to marry." See also *Latta*, 2014 WL 4977682, at *9 ("a primary purpose of the Constitution is to protect minorities from oppression by majorities"). The Seventh Circuit

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course, no bar to this Court's consideration of the issues presented in this case.

found that "[m]inorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Baskin*, 766 F.3d at 671.

B. The Fundamental Right to Marry.

The Sixth Circuit found that this Court's precedents do not recognize a fundamental right to "same-sex marriage" in part because this Court could not have envisioned a marriage between two persons of the same sex when it decided *Loving* or *Zablocki*, and nothing about marriage for same-sex couples is "deeply rooted in this nation's history and tradition." Pet. App. 45-46. The Fourth and Tenth Circuits held that the bans violate the fundamental right to marry. See, *e.g.*, *Bostic*, 760 F.3d at 375-77. The court reasoned in *Kitchen*, 755 F.3d at 1208-18, that "in describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right." See also discussion *infra* at Part II. Thus, "[c]onsistent with our constitutional tradition of recognizing the liberty of those previously excluded," "[same-sex couples] possess a fundamental right to marry and to have their marriages recognized." 755 F.3d at 1218.

C. Equal Protection/Standard of Scrutiny.

The Sixth Circuit's rejection of heightened scrutiny based on the quasi-suspect classification of sexual orientation conflicts with the Second and Ninth Circuits' holdings as to this issue. See *Windsor v. United States*, 699 F.3d 169, 181-185 (2d Cir. 2012); *Latta*, 2014 WL 497682, at **3-11, relying upon *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 479-484 (9th Cir. 2014)(sexual orientation

discrimination); see also *Latta*, 2014 WL 497682, at ** 14-23 (Berzon, J., concurring)(gender discrimination).

Even if rational basis review is the applicable standard, however, the Sixth Circuit's application of this standard conflicts with that of the other circuits. The Sixth Circuit applied highly deferential rational basis review as though this were a simple economic line-drawing case, quoting *F.C.C. v. Beach Communications*, 508 U.S. 307, 312-315 (1993), and *Heller v. Doe*, 509 U.S. 312 (1993), and found that the ban in this case withstands review. Pet. App. 31-39. The sister circuits that reached rational basis review rejected this analysis or relied on other of this Court's rational basis precedents. See discussion *infra* at Part II. The Seventh Circuit, eschewing a rigid tier-based formula, found that the states had given the court "no reason to think that they have a 'reasonable basis' for forbidding same-sex marriage," *Baskin*, 766 F.3d at 654 (citing *Beach*, 508 U.S. at 313 (more than a reasonable basis is required where the challenged discrimination is "along suspect lines")).

D. Analysis of State's Justification for the Ban.

Unlike other circuits, the Sixth Circuit accepted the State's rationales, but avoided relying on Michigan's primary trial justification – optimal child outcomes. Instead, the Sixth Circuit relied on the State's claimed interest in steering heterosexual procreation into marriage which, the majority claimed, solves the problem of "accidental pregnancies", which can only affect opposite-sex couples. Pet. App. 32-35. The Sixth Circuit did not provide any explanation of how the exclusion of same-sex couples from marriage furthers

this rationale. In contrast, the Seventh Circuit found this same argument "so full of holes that it cannot be taken seriously." *Baskin*, 766 F.3d at 656. It further explained, "[t]o the extent that children are better off in families in which the parents are married, they are better off whether they are raised by their biological parents or by adoptive parents." *Id.* Other circuits echo this point, finding that marriage brings stability to all families with children. See *Bostic*, 760 F.3d at 383 (the ban "actually harm[s] the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters"); *Kitchen*, 755 F.3d at 1215 ("These laws deny to the children of same-sex couples the recognition essential to stability, predictability, and dignity.").

As to positing "procreation" as the state's essential purpose in licensing marriages, the Ninth Circuit observed that this position contradicts existing precedent, citing *Turner v. Safley*, 482 U.S. 78 (1987), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), and found it irrational that states permit marriage by many opposite-sex couples who will not reproduce - the sterile and elderly - but not by same-sex couples who already have children or who are in the process of having or adopting children. See *Latta*, 2014 WL 4977682, at *7. Similarly, the Tenth Circuit explained that the challenged provisions of the Utah law do not distinguish based upon procreative lines at all where "[t]he elderly, those medically unable to conceive, and those who exercise their fundamental right not to have biological children" may all marry. *Kitchen*, 755 F.3d at 1219. The Seventh Circuit also noted that marriage by same-sex couples can actually alleviate the problem of

"accidental birth," since same-sex couples can adopt children and are five times as likely to be raising an adopted child as heterosexual couples in Indiana and two and one-half times as likely as in Wisconsin. *Baskin*, 766 F.3d at 663.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. Federalism and the Democratic Process.

The Sixth Circuit, finding the democratic process as the preferable means for resolving same-sex couples' exclusion from marriage, suggested that marriage bans will end once the electorate has been convinced and "hearts and minds" have changed. Pet. App. 35-36, 55-56, 66-67. Yet the judiciary's role in our constitutional scheme requires it to decide whether laws exceed constitutional bounds. See, *e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("fundamental rights are not subject to popular vote: they depend on the outcome of no election"). Marriage laws are obviously not exempted from judicial review. See, *e.g.*, *Turner v. Safley*, *supra*, 482 U.S. at 99; *Zablocki v. Redhail*, *supra*, 434 U.S. at 390. Likewise, as to voter-enacted laws, this Court's decision in *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1637 (2014), itself emphasizes that "the Constitution requires redress by the courts" when "hurt or injury is inflicted on" a minority by the "command of laws or other state action." *Id.* (plurality opinion of Kennedy, J.).

Asking Petitioners to "wait and see," as the Sixth Circuit does, is the kind of "go slow" approach this

Court has previously rejected. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court decided the standard of review applicable to sex discrimination claims, despite arguments that the Court should stay its hand and await passage of the Equal Rights Amendment. *Id.* at 692 (Powell, J., concurring in the judgment). Likewise in *Loving*, this Court decided the core constitutional issues at hand rather than wait for further studies about the claimed perils (especially to the country's children) of blending the races. Brief and Appendix on Behalf of Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931 (U.S.S.Ct. 1967).

B. The Fundamental Right to Marry.

The Sixth Circuit found the freedom to marry inapplicable to same-sex couples. Pet. App. 45-47. Prior decisions of this Court establish marriage as "the most important relation in life" and "of fundamental importance for all individuals," *Zablocki*, 434 U.S. at 384, but the Sixth Circuit found the "old definition" to be "[]tethered to biology". Pet. App. 48. This reductionist view of the liberties encompassed in marriage contradicts this Court's view, expressed just over ten years ago, that gay and lesbian people may "seek autonomy" for the same purposes "as heterosexuals do," including with respect to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence*, 539 U.S. at 574.

The Sixth Circuit also asserted skepticism about whether marriage is constitutionally protected at all, noting that "the right to marry in general, and the right to gay marriage in particular" is not explicitly

protected in the U.S. Constitution. Pet. App. 46. However, the "original meaning" methodology of "defin[ing] rights at the most specific level, that were protected when the Fourteenth Amendment was ratified," is incompatible with the "promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992); *id.* ("Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in [*Loving*]"). Our Constitution protects liberties whose manifestations were not anticipated in the eighteenth century. *Lawrence,* 539 U.S. at 578-79 ("[T]hose who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment ... knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.").

C. Equal Protection and Rational Basis Review.

The Sixth Circuit found that, under rational basis review, legislative choices are presumptively valid and that mere imperfect line drawing does not violate equal protection. Citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), the court concluded that if the State can articulate any benevolent purpose in the mix, a law will survive rational basis review. In addition to omitting the rational relationship prong of rational basis review, the Sixth's Circuit's application

of *Murgia* in this context conflicts with the more apt decisions of this Court striking down laws that are invidiously under-inclusive; laws "riddled with exceptions," *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (contraceptives to married, but not unmarried persons); laws that suffer from misfit classifications that identify a purported State interest but which reach only a segment of the population affected by the interest, *Jiminez v. Weinberger*, 417 U.S. 628, 637 (1974) (Social Security to some illegitimate children, not others); and laws finding that the State's justification "ma[kes] no sense in light of how [the government] treated other similarly situated groups." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (discussing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)). See also *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973) (denying food stamps only to "hippies").

The Sixth Circuit's decision is also incompatible with this Court's admonition in *F.C.C. v. Beach Communications*, 508 U.S. 307, 312-15 (1993), that the presumption in favor of legislative choices applies only in the absence of "*some reason to infer antipathy*." *Id.* at 314 (emphasis added). The undisputed record of this case makes clear, however, that there is ample reason to infer antipathy against gay and lesbian people in Michigan and across this country. See Chauncey Report (No. 12-10285) (ECF 169-1, Pg ID 4744-4789). Moreover, there is specific reason to infer antipathy in the enactment of the MMA and its parallel statues; as with the Defense of Marriage Act [DOMA], these provisions exclude qualified same-sex couples from the treatment identically situated opposite-sex couples would receive. See also *Windsor*, 133 S.Ct. at 2693

(discussing DOMA in the context of *Moreno*, 413 U.S. at 534-35, and referencing a "history of disparate treatment . . . of a politically unpopular group").

The Sixth Circuit's conclusion that only demonstrable affirmative evidence of voter animus may invalidate a law is also inconsistent with this Court's holdings. *Windsor* looked to the "purpose and effect" of DOMA, including its text, the circumstances giving rise to DOMA, and its singling out of only one class of married persons, in striking down that law. *Windsor*, 133 S.Ct. at 2693-2694. This Court inferred the existence of animus in *Romer v. Evans*, 517 U.S. 620, 634 (1996), by looking to the history of the enactment, the fact that gay people were a politically unpopular group, citing *Moreno*, and the fact that the referendum "identifie[d] persons by a single trait and then denie[d] them protection across the board." *Id.* at 633. The fact that the initiative inflicted "immediate, continuing and real injuries that outrun and belie any legitimate justifications that may be claimed for it" supported that inference. *Id.* at 635. But see Pet. App. 40-44.

Finally, the Sixth Circuit's rational basis analysis conflicts with this Court's precedent because it nowhere takes into account the significant legal burdens and detriments imposed by denying marriage to same-sex couples, as well as the dignity and emotional well-being of the couples and any children they may have. See, *e.g.*, *Windsor*, 133 S.Ct. at 2694 (DOMA serves to "humiliate[] tens of thousands of children now being raised by same sex couples . . . mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily

lives."); see also *DeBoer*, Pet. App. 68-69 (Daughtrey, J., dissenting) (" . . . [T]he majority treats both the issues and the litigants here as mere abstractions . . . [i]nstead of recognizing the plaintiffs as persons, suffering actual harm as a result of being denied the right to marry. . . .").

III. THE QUESTION PRESENTED IS OF OVERRIDING PUBLIC IMPORTANCE.

This case presents an overwhelmingly important question of national significance "that has not been, but should be, settled by this Court" at this time. S. Ct. Rule 10(c); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650 (2003) (granting certiorari "because the questions presented are of national importance"); *Olmstead v. Zimring*, 527 U.S. 581, 596 (1999) ("We granted certiorari in view of the importance of the question presented to the States and affected individuals."). While same-sex couples in approximately two thirds of the states and the District of Columbia are now free to marry, same-sex couples in the remaining states continue to be denied equal treatment and this fundamental right based solely on their sexual orientation. Moreover, if certiorari is not granted, "the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved." *Windsor*, 133 S.Ct. at 2688.

Review by the Court is necessary at this time because of the persistent harm marriage bans cause the Petitioners and many gay and lesbian Americans

and their children across the nation.[6] The bans implicate Petitioners' and all other similarly situated persons' liberty and dignity and interfere with their freedom "to establish a home," to "bring up children," and to "enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free persons." *Meyer*, 262 U.S. at 399. Moreover, each day the bans remain in place, these couples are deprived of myriad rights and benefits, including survivor's social security, spouse-based medical care, and retirement and tax benefits – "the main components of the social safety net for vast numbers of Americans." *Massachusetts v. U.S. Dept. of Health & Human Services*, 682 F.3d 1, 11 (1st Cir. 2012).[7]

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[6] There are "tens of thousands" of other same-sex couple families across the country. *Windsor*, 133 S.Ct. at 2694. In Michigan alone, there are approximately 14,598 same-sex couples living together. Approximately 2,650 such couples are raising 5,300 children. Pet. App. 113. Nationwide, more than 8 million adults identify themselves as gay or lesbian, and more than 125,000 same-sex couples are raising nearly 220,000 children. See Brief of Amicus Curiae Gary J. Gates in Support of Plaintiffs-Appellees and Intervenors, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (Nos. 14-1167, 14-1169, 14-1173), 2014 WL 1511207, at *5; see also *Baskin*, 766 F.3d at 663. In addition, there are 400,000 children languishing in foster care in the United States, with many competent and caring same-sex couples willing to adopt if permitted to do so jointly. *Id.*

[7] Tangible protections and responsibilities denied to gay and lesbian couples under Michigan law include, but are not limited to, intestacy rights permitting a surviving spouse to inherit automatically from the deceased spouse's estate if there are no parents or issue, Mich. Comp. Laws § 700.2201-700.2205; authorizing a surviving spouse to an allowance or to occupy the

In addition, the bans deny children in same-sex couple families the dignity, status, stability, and security enjoyed by the children of married opposite-sex couple parents, and they exact a harsh practical toll by depriving them of multiple substantial material benefits. The trial record in this case demonstrated that the bans are harming children legally, economically, socially and psychologically. The children are excluded from many benefits associated with having a second legal parent and may suffer unnecessary fear, anxiety, and insecurity related to possible separation from the second parent in the event of their parents' separation or upon the death of the biological or adoptive legal parent. See Brodzinsky, (No. 12-10285) (ECF 143, Pg ID 3252-55). The trial record also demonstrated that the second-parent

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homestead while the estate is being settled, Mich. Comp. Laws § 700.2205; authorizing a surviving spouse to file a wrongful death lawsuit when a spouse is killed, Mich. Comp. Laws § 600.2922(2)(a); receiving workers' compensation death benefits and retirement benefits when a working spouse is killed or retires, Mich. Comp. Laws § 420.3; access to dissolution laws regulating separation and divorce, including child custody, visitation, and support, Mich. Comp. Laws § 552.23, § 772.2(c), *Harmon v. Davis*, 800 N.W.2d 986 (Mich. 2011); assuming decisionmaking authority for the spouse's health decisions when the spouse cannot, including regarding life-sustaining procedures and organ donation, *In re Martin*, 504 N.W.2d 917 (Mich. Ct. App.1993); consenting to a post-mortem examination, Mich. Comp. Laws § 333.2855; making burial arrangements for a deceased spouse, Mich. Comp. Laws § 700.3206; receiving a spouse's veterans' benefits, Mich. Comp. Laws § 206.506; receiving crime victims' recovery benefits for a spouse who is a crime victim, Mich. Comp. Laws § 780.766(4)(h); and being treated as a family for purposes of workplace benefits. See, *e.g.*, *Nat'l Pride at Work v. Governor of Mich.*, 748 N.W.2d 524 (Mich. 2008); *id. at* 98-99, n. 44-49 (Kelly, J., dissenting).

adoption and marriage bans in tandem harm children further by deterring competent and caring same-sex couple parents from adopting hard-to-place children, as a couple, from the State's burgeoning foster care system. *Id.* at 3257-62.

This Court should also grant certiorari because the issue is highly unlikely to be resolved without this Court's intervention, and deferring consideration of this issue will not result in further development of lower court case law that will assist the Court in its consideration. Rather, considering the issue now would substantially promote judicial economy, as there are currently twenty-six cases pending in lower federal courts presenting issues that would be resolved or substantially advanced by the Court in this case. See Freedom to Marry, *Marriage Litigation*, http://www.freedomtomarry.org/litigation (last visited November 10, 2014).

IV. PETITIONERS' CASE PRESENTS AN APPROPRIATE VEHICLE FOR REVIEW.

Because Michigan's constitutional and statutory bans are both broad and representative of those in many other states,[8] this Court's review would settle the central question that remains across the country. The laws challenged here deny to same-sex couples marriage or any "similar union for any purpose." The MMA and parallel statutes extend not only to marriages within the state but also to the recognition of marriages "contracted . . . [in] another jurisdiction."

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[8] See Alison M. Smith, Cong. Research Serv., RL 31944, *Same-Sex Marriage: Legal Issues* (2013) at 30-32 (summarizing state marriage statutes).

Mich. Comp. Laws § 551.272. Michigan's prohibitions include both legislatively adopted statutes[9] and a constitutional amendment enacted by state-wide voter initiative. Moreover, on appeal, the Sixth Circuit considered marriage or marriage recognition challenges from three other states as well (Kentucky, Tennessee and Ohio). Consequently, granting review in Petitioners' case would enable this Court to resolve the widest array of marriage-related questions in a single case.

This case has been vigorously litigated throughout by both the Michigan Governor and Attorney General in a unified defense to the challenged laws, and they are the proper parties to speak on the state's behalf and to assert Michigan's interests. They bring concrete adverseness to this lawsuit. There are no jurisdictional or standing problems such as those involved in *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2661-68 (2013).

Finally, this case is the only case currently pending on appeal in which the district court engaged in fact-

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[9] The Sixth Circuit majority appears to state that Petitioners limited their challenge below to the State's constitutional amendment excluding them from the right to marry and failed to challenge parallel statutory provisions on either federal or state constitutional grounds. Pet. App. 45. However, Petitioners have, in fact, challenged the relevant Michigan statutory provisions. Pet. App. 104; Brief in Support of Petitioners' Motion for Summary Judgment (No. 12-10285)(ECF 67, Pg ID 1401); Brief on Appeal (No. 14-1341) (ECF 13, Pg ID 13, 15). The district court's judgment also specifically applied to both "the Michigan Marriage Amendment and its implementing statutes." Pet. App. 141. Moreover, with the state constitutional amendment in place, it would have been futile to raise a *state* constitutional challenge to the statutes.

finding to assist its task. Expert testimony presented in the fields of sociology, psychology, demography, history, and law addressed the facts underlying the parties' respective claims. Moreover, because this action was brought originally on behalf of Petitioners and their three minor children, issues relating uniquely to the children were examined thoroughly in the crucible of the trial process. This record may also be of assistance to this Court.

April DeBoer and Jayne Rowse, working on the front lines as nurses in the emergency room and neonatal intensive care unit, saw a void and filled it for three children who are now their own. Pet. App. 105, 138. ("No court record of this proceeding could ever fully convey the personal sacrifice of these two plaintiffs. . . ."). As the trial below demonstrated, their story, while extraordinary, is not unique, as tens of thousands of same-sex couples step forward taking in hard-to-place children – special needs children, children of color – the children left behind. As the Seventh Circuit articulated so eloquently in *Baskin*, 766 F.3d at 664, the unintended consequences of striking down these bans are not dire after all, with the wonderful confluence of children in need and caring same-sex couples lining up to give them homes.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 14a0275p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 14-1341; 3057; 3464; 5291; 5297; 5818

[Filed November 6, 2014]

14-1341

APRIL DEBOER, et al.,
Plaintiffs-Appellees,
v.
RICHARD SNYDER, Governor, State of Michigan, in his official capacity, et al.,
Defendants-Appellants.

14-3057

JAMES OBERGEFELL, et al.,
Plaintiffs-Appellees,
v.
RICHARD HODGES, Director of the Ohio Department of Health, in his official capacity,
Defendant-Appellant.

14-3464

BRITTANI HENRY, et al.,
Plaintiffs-Appellees,

v.

RICHARD HODGES, Director of the Ohio Department of Health, in his official capacity,
Defendant-Appellant.

14-5291

GREGORY BOURKE, et al.,
Plaintiffs-Appellees,

v.

STEVE BESHEAR, Governor, Commonwealth of Kentucky, in his official capacity,
Defendant-Appellant.

14-5297

VALERIA TANCO, et al.,
Plaintiffs-Appellees,

v.

WILLIAM EDWARD "BILL" HASLAM, Governor, State of Tennessee, in his official capacity, et al.,
Defendants-Appellants.

14-5818

TIMOTHY LOVE, et al.,
Plaintiffs / Intervenors-Appellees,

v.

STEVE BESHEAR, Governor, Commonwealth of Kentucky, in his official capacity,
Defendant-Appellant.

14-1341

Appeal from the United States District Court for the Eastern District of Michigan at Detroit; No. 2:12-cv-10285—Bernard A. Friedman, District Judge.

14-3057 & 14-3464

Appeals from the United States District Court for the Southern District of Ohio at Cincinnati; Nos. 1:13-cv-00501 & 1:14-cv-00129—Timothy S. Black, District Judge.

14-5291 & 14-5818

Appeals from the United States District Court for the Western District of Kentucky at Louisville; No. 3:13-cv-00750—John G. Heyburn II, District Judge.

14-5297

Appeal from the United States District Court for the Middle District of Tennessee at Nashville; No. 3:13-cv-01159—Aleta Arthur Trauger, District Judge.

Argued: August 6, 2014

Decided and Filed: November 6, 2014

Before: DAUGHTREY, SUTTON and COOK, Circuit Judges.

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SUTTON, J., delivered the opinion of the court, in which COOK, J., joined. DAUGHTREY, J. (pp. 43–64), delivered a separate dissenting opinion.

OPINION

SUTTON, Circuit Judge. This is a case about change—and how best to handle it under the United States Constitution. From the vantage point of 2014, it would now seem, the question is not whether American

law will allow gay couples to marry; it is when and how that will happen. That would not have seemed likely as recently as a dozen years ago. For better, for worse, or for more of the same, marriage has long been a social institution defined by relationships between men and women. So long defined, the tradition is measured in millennia, not centuries or decades. So widely shared, the tradition until recently had been adopted by all governments and major religions of the world.

But things change, sometimes quickly. Since 2003, nineteen States and the District of Columbia have expanded the definition of marriage to include gay couples, some through state legislation, some through initiatives of the people, some through state court decisions, and some through the actions of state governors and attorneys general who opted not to appeal adverse court decisions. Nor does this momentum show any signs of slowing. Twelve of the nineteen States that now recognize gay marriage did so in the last couple of years. On top of that, four federal courts of appeals have compelled several other States to permit same-sex marriages under the Fourteenth Amendment.

What remains is a debate about whether to allow the democratic processes begun in the States to continue in the four States of the Sixth Circuit or to end them now by requiring all States in the Circuit to extend the definition of marriage to encompass gay couples. Process and structure matter greatly in American government. Indeed, they may be the most reliable, liberty-assuring guarantees of our system of government, requiring us to take seriously the route the United States Constitution contemplates for

making such a fundamental change to such a fundamental social institution.

Of all the ways to resolve this question, one option is not available: a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea. Our judicial commissions did not come with such a sweeping grant of authority, one that would allow just three of us—just two of us in truth—to make such a vital policy call for the thirty-two million citizens who live within the four States of the Sixth Circuit: Kentucky, Michigan, Ohio, and Tennessee. What we have authority to decide instead is a legal question: Does the Fourteenth Amendment to the United States Constitution prohibit a State from defining marriage as a relationship between one man and one woman?

Through a mixture of common law decisions, statutes, and constitutional provisions, each State in the Sixth Circuit has long adhered to the traditional definition of marriage. Sixteen gay and lesbian couples claim that this definition violates their rights under the Fourteenth Amendment. The circumstances that gave rise to the challenges vary. Some involve a birth, others a death. Some involve concerns about property, taxes, and insurance, others death certificates and rights to visit a partner or partner's child in the hospital. Some involve a couple's effort to obtain a marriage license within their State, others an effort to achieve recognition of a marriage solemnized in another State. All seek dignity and respect, the same dignity and respect given to marriages between opposite-sex couples. And all come down to the same question: Who decides? Is this a matter that the National Constitution

commits to resolution by the federal courts or leaves to the less expedient, but usually reliable, work of the state democratic processes?

I.

Michigan. One case comes from Michigan, where state law has defined marriage as a relationship between a man and a woman since its territorial days. *See* An Act Regulating Marriages § 1 (1820), *in* 1 *Laws of the Territory of Michigan* 646, 646 (1871). The State reaffirmed this view in 1996 when it enacted a law that declared marriage "inherently a unique relationship between a man and a woman." Mich. Comp. Laws § 551.1. In 2004, after the Massachusetts Supreme Judicial Court invalidated the Commonwealth's prohibition on same-sex marriage, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), nearly fifty-nine percent of Michigan voters opted to constitutionalize the State's definition of marriage. "To secure and preserve the benefits of marriage for our society and for future generations of children," the amendment says, "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const. art. I, § 25.

April DeBoer and Jayne Rowse, a lesbian couple living in Michigan, challenge the constitutionality of this definition. Marriage was not their first objective. DeBoer and Rowse each had adopted children as single parents, and both wanted to serve as adoptive parents for the other partner's children. Their initial complaint alleged that Michigan's adoption laws violated the Equal Protection Clause of the Fourteenth Amendment. The State moved to dismiss the lawsuit

for lack of standing, and the district court tentatively agreed. Rather than dismissing the action, the court "invit[ed the] plaintiffs to seek leave to amend their complaint to . . . challenge" Michigan's laws denying them a marriage license. *DeBoer* R. 151 at 3. DeBoer and Rowse accepted the invitation and filed a new complaint alleging that Michigan's marriage laws violated the due process and equal protection guarantees of the Fourteenth Amendment.

Both sets of parties moved for summary judgment. The district court concluded that the dispute raised "a triable issue of fact" over whether the "rationales" for the Michigan laws furthered "a legitimate state interest," and it held a nine-day trial on the issue. *DeBoer* R. 89 at 4, 8. The plaintiffs' experts testified that same-sex couples raise children as well as opposite-sex couples, and that denying marriage to same-sex couples creates instabilities for their children and families. The defendants' experts testified that the evidence regarding the comparative success of children raised in same-sex households is inconclusive. The district court sided with the plaintiffs. It rejected all of the State's bases for its marriage laws and concluded that the laws failed to satisfy rational basis review.

Kentucky. Two cases challenge two aspects of Kentucky's marriage laws. Early on, Kentucky defined marriage as "the union of a man and a woman." *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973); *see* An Act for Regulating the Solemnization of Marriages § 1, 1798 Ky. Acts 49, 49–50. In 1998, the Kentucky legislature codified the common law definition. The statute says that "'marriage' refers only to the civil status, condition, or relation of one (1) man and one

(1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex." Ky. Rev. Stat. § 402.005. In 2004, the Kentucky legislature proposed a constitutional amendment providing that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky." Ky. Const. § 233A. Seventy-four percent of the voters approved the amendment.

Two groups of plaintiffs challenge these Kentucky laws. One group, the fortuitously named *Love* plaintiffs, challenges the Commonwealth's marriage-licensing law. Two couples filed that lawsuit: Timothy Love and Lawrence Ysunza, along with Maurice Blanchard and Dominique James. Both couples claim that the Fourteenth Amendment prohibits Kentucky from denying them marriage licenses.

The other group, the *Bourke* plaintiffs, challenges the ban on recognizing out-of-state same-sex marriages. Four same-sex couples filed the lawsuit: Gregory Bourke and Michael DeLeon; Jimmy Meade and Luther Barlowe; Randell Johnson and Paul Campion; and Kimberly Franklin and Tamera Boyd. All four couples were married outside Kentucky, and they contend that the State's recognition ban violates their due process and equal protection rights. Citing the hardships imposed on them by the recognition ban—loss of tax breaks, exclusion from intestacy laws, loss of dignity—they seek to enjoin its enforcement.

The district court ruled for the plaintiffs in both cases. In *Love*, the court held that the Commonwealth

could not justify its definition of marriage on rational basis grounds. It also thought that classifications based on sexual orientation should be subjected to intermediate scrutiny, which the Commonwealth also failed to satisfy. In *Bourke*, the court invalidated the recognition ban on rational basis grounds.

Ohio. Two cases challenge Ohio's refusal to recognize out-of-state same-sex marriages. Ohio also has long adhered to the traditional definition of marriage. *See* An Act Regulating Marriages § 1, 1803 Ohio Laws 31, 31; *Carmichael v. State*, 12 Ohio St. 553, 560 (1861). It reaffirmed this definition in 2004, when the legislature passed a Defense of Marriage Act, which says that marriage "may only be entered into by one man and one woman." Ohio Rev. Code § 3101.01(A). "Any marriage entered into by persons of the same sex in any other jurisdiction," it adds, "shall be considered and treated in all respects as having no legal force or effect." *Id.* § 3101.01(C)(2). Later that same year, sixty-two percent of Ohio voters approved an amendment to the Ohio Constitution along the same lines. As amended, the Ohio Constitution says that Ohio recognizes only "a union between one man and one woman" as a valid marriage. Ohio Const. art. XV, § 11.

Two groups of plaintiffs challenge these Ohio laws. The first group, the *Obergefell* plaintiffs, focuses on one application of the law. They argue that Ohio's refusal to recognize their out-of-state marriages on Ohio-issued death certificates violates due process and equal protection. Two same-sex couples in long-term, committed relationships filed the lawsuit: James Obergefell and John Arthur; and David Michener and

William Herbert Ives. All four of them are from Ohio and were married in other States. When Arthur and Ives died, the State would not list Obergefell and Michener as spouses on their death certificates. Obergefell and Michener sought an injunction to require the State to list them as spouses on the certificates. Robert Grunn, a funeral director, joined the lawsuit, asking the court to protect his right to recognize same-sex marriages on other death certificates.

The second group, the *Henry* plaintiffs, raises a broader challenge. They argue that Ohio's refusal to recognize out-of-state marriages between same-sex couples violates the Fourteenth Amendment no matter what marital benefit is affected. The *Henry* case involves four same-sex couples, all married in other States, who want Ohio to recognize their marriages on their children's birth certificates. Three of the couples (Brittani Henry and Brittni Rogers; Nicole and Pam Yorksmith; Kelly Noe and Kelly McCracken) gave birth to children in Ohio and wish to have both of their names listed on each child's birth certificate rather than just the child's biological mother. The fourth couple (Joseph Vitale and Robert Talmas) lives in New York and adopted a child born in Ohio. They seek to amend their son's Ohio birth certificate so that it lists both of them as parents.

The district court granted the plaintiffs relief in both cases. In *Obergefell*, the court concluded that the Fourteenth Amendment protects a fundamental right to keep existing marital relationships intact, and that the State failed to justify its law under heightened scrutiny. The court likewise concluded that

classifications based on sexual orientation deserve heightened scrutiny under equal protection, and that Ohio failed to justify its refusal to recognize the couples' existing marriages. Even under rational basis review, the court added, the State came up short. In *Henry*, the district court reached many of the same conclusions and expanded its recognition remedy to encompass all married same-sex couples and all legal incidents of marriage under Ohio law.

Tennessee. The Tennessee case is of a piece with the two Ohio cases and one of the Kentucky cases, as it too challenges the State's same-sex-marriage recognition ban. Tennessee has always defined marriage in traditional terms. *See* An Act Concerning Marriages § 3 (1741), *in Public Acts of the General Assembly of North-Carolina and Tennessee* 46, 46 (1815). In 1996, the Tennessee legislature reaffirmed "that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage." Tenn. Code Ann. § 36-3-113(a). In 2006, the State amended its constitution to incorporate the existing definition of marriage. *See* Tenn. Const. art. XI, § 18. Eighty percent of the voters supported the amendment.

Three same-sex couples, all in committed relationships, challenge the recognition ban: Valeria Tanco and Sophy Jesty; Ijpe DeKoe and Thomas Kostura; and Johno Espejo and Matthew Mansell. All three couples were legally married in other States. The district court preliminarily enjoined the law. Relying on district court decisions within the circuit and

elsewhere, the court concluded that the couples likely would show that Tennessee's ban failed to satisfy rational basis review. The remaining preliminary injunction factors, the court held, also weighed in the plaintiffs' favor.

All four States appealed the decisions against them.

II.

Does the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment require States to expand the definition of marriage to include same-sex couples? The Michigan appeal (*DeBoer*) presents this threshold question, and so does one of the Kentucky appeals (*Love*). Caselaw offers many ways to think about the issue.

A.

Perspective of an intermediate court. Start with a recognition of our place in the hierarchy of the federal courts. As an "inferior" court (the Constitution's preferred term, not ours), a federal court of appeals begins by asking what the Supreme Court's precedents require on the topic at hand. Just such a precedent confronts us.

In the early 1970s, a Methodist minister married Richard Baker and James McConnell in Minnesota. Afterwards, they sought a marriage license from the State. When the clerk of the state court denied the request, the couple filed a lawsuit claiming that the denial of their request violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). The Minnesota Supreme Court rejected

both claims. As for the due process claim, the state court reasoned: "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. . . . This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause . . . is not a charter for restructuring it by judicial legislation." *Id.* As for the equal protection claim, the court reasoned: "[T]he state's classification of persons authorized to marry" does not create an "irrational or invidious discrimination. . . . [T]hat the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate . . . [creates only a] theoretically imperfect [classification] . . . [and] 'abstract symmetry' is not demanded by the Fourteenth Amendment." *Id.* at 187. The Supreme Court's decision four years earlier in *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated Virginia's ban on interracial marriages, did not change this conclusion. "[I]n commonsense and in a constitutional sense," the state court explained, "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Baker*, 191 N.W.2d at 187.

Baker and McConnell appealed to the United States Supreme Court. The Court rejected their challenge, issuing a one-line order stating that the appeal did not raise "a substantial federal question." *Baker v. Nelson*, 409 U.S. 810, 810 (1972). This type of summary decision, it is true, does not bind the Supreme Court in later cases. But it does confine lower federal courts in

later cases. It matters not whether we think the decision was right in its time, remains right today, or will be followed by the Court in the future. Only the Supreme Court may overrule its own precedents, and we remain bound even by its summary decisions "until such time as the Court informs [us] that [we] are not." *Hicks v. Miranda*, 422 U.S. 332, 345 (1975) (internal quotation marks omitted). The Court has yet to inform us that we are not, and we have no license to engage in a guessing game about whether the Court will change its mind or, more aggressively, to assume authority to overrule *Baker* ourselves.

But that was then; this is now. And now, claimants insist, must account for *United States v. Windsor*, 133 S. Ct. 2675 (2013), which invalidated the Defense of Marriage Act of 1996, a law that refused for purposes of federal statutory benefits to respect gay marriages authorized by state law. Yet *Windsor* does not answer today's question. The decision never mentions *Baker*, much less overrules it. And the outcomes of the cases do not clash. *Windsor* invalidated a federal law that refused to respect state laws permitting gay marriage, while *Baker* upheld the right of the people of a State to define marriage as they see it. To respect one decision does not slight the other. Nor does *Windsor*'s reasoning clash with *Baker*. *Windsor* hinges on the Defense of Marriage Act's unprecedented intrusion into the States' authority over domestic relations. *Id.* at 2691–92. Before the Act's passage in 1996, the federal government had traditionally relied on state definitions of marriage instead of purporting to define marriage itself. *Id.* at 2691. That premise does not work—it runs the other way—in a case involving a challenge in federal court to state laws defining marriage. The point

of *Windsor* was to prevent the Federal Government from "divest[ing]" gay couples of "a dignity and status of immense import" that New York's extension of the definition of marriage gave them, an extension that "without doubt" any State could provide. *Id.* at 2692, 2695. *Windsor* made explicit that it does not answer today's question, telling us that the "opinion and its holding are confined to . . . lawful marriages" already protected by some of the States. *Id.* at 2696. Bringing the matter to a close, the Court held minutes after releasing *Windsor* that procedural obstacles in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), prevented it from considering the validity of state marriage laws. Saying that the Court declined in *Hollingsworth* to overrule *Baker* openly but decided in *Windsor* to overrule it by stealth makes an unflattering and unfair estimate of the Justices' candor.

Even if *Windsor* did not overrule *Baker* by name, the claimants point out, lower courts still may rely on "doctrinal developments" in the aftermath of a summary disposition as a ground for not following the decision. *Hicks*, 422 U.S. at 344. And *Windsor*, they say, together with *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), permit us to cast *Baker* aside. But this reading of "doctrinal developments" would be a groundbreaking development of its own. From the perspective of a lower court, summary dispositions remain "controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976); *see Hicks*, 422 U.S. at 343–45. And the Court has told us to treat the two types of decisions, whether summary dispositions or full-merits decisions, the same, "prevent[ing] lower courts" in both settings "from

coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Lest doubt remain, the Court has also told us not to ignore its decisions even when they are in tension with a new line of cases. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Just two scenarios, then, permit us to ignore a Supreme Court decision, whatever its form: when the Court has overruled the decision by name (if, say, *Windsor* had directly overruled *Baker*) or when the Court has overruled the decision by outcome (if, say, *Hollingsworth* had invalidated the California law without mentioning *Baker*). Any other approach returns us to a world in which the lower courts may anticipatorily overrule all manner of Supreme Court decisions based on counting-to-five predictions, perceived trajectories in the caselaw, or, worst of all, new appointments to the Court. In the end, neither of the two preconditions for ignoring Supreme Court precedent applies here. *Windsor* as shown does not mention *Baker*, and it clarifies that its "opinion and holding" do not govern the States' authority to define marriage. *Hollingsworth* was dismissed. And neither *Lawrence* nor *Romer* mentions *Baker*, and neither is inconsistent with its outcome. The one invalidates a State's criminal antisodomy law and explains that the case "does not involve . . . formal recognition" of

same-sex relationships. *Lawrence*, 539 U.S. at 578. The other invalidates a "[s]weeping" and "unprecedented" state law that prohibited local communities from passing laws that protect citizens from discrimination based on sexual orientation. *Romer*, 517 U.S. at 627, 633, 635–36.

That brings us to another one-line order. On October 6, 2014, the Supreme Court "denied" the "petitions for writs of certiorari" in 1,575 cases, seven of which arose from challenges to decisions of the Fourth, Seventh, and Tenth Circuits that recognized a constitutional right to same-sex marriage. But this kind of action (or inaction) "imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923). "The 'variety of considerations [that] underlie denials of the writ' counsels against according denials of certiorari any precedential value." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (internal citation omitted). Just as the Court's three decisions to stay those same court of appeals decisions over the past year, all without a registered dissent, did not end the debate on this issue, so too the Court's decision to deny certiorari in all of these appeals, all without a registered dissent, does not end the debate either. A decision not to decide is a decision not to decide.

But don't *these* denials of certiorari signal that, from the Court's perspective, the right to same-sex marriage is inevitable? Maybe; maybe not. Even if we grant the premise and assume that same-sex marriage will be recognized one day in all fifty States, that does not tell us how—whether through the courts or through democracy. And, if through the courts, that does not

tell us why—whether through one theory of constitutional invalidity or another. Four courts of appeals thus far have recognized a constitutional right to same-sex marriage. They agree on one thing: the result. But they reach that outcome in many ways, often more than one way in the same decision. *See Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (fundamental rights); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (rational basis, animus); *Latta v. Otter*, No. 14-35420, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (animus, fundamental rights, suspect classification); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) (fundamental rights); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (same). The Court's certiorari denials tell us nothing about the democracy-versus-litigation path to same-sex marriage, and they tell us nothing about the validity of any of these theories. If a federal court denies the people suffrage over an issue long thought to be within their power, they deserve an explanation. We, for our part, cannot find one, as several other judges have concluded as well. *See Bostic*, 760 F.3d at 385–98 (Niemeyer, J., dissenting); *Kitchen*, 755 F.3d at 1230–40 (Kelly, J., concurring in part and dissenting in part); *Conde-Vidal v. Garcia-Padilla*, No. 14-1253-PG, 2014 WL 5361987 (D.P.R. Oct. 21, 2014); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014).

There are many ways, as these lower court decisions confirm, to look at this question: originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning. The parties in one way or another have invoked them all. Not one of the plaintiffs' theories, however, makes the case for constitutionalizing the definition of marriage and for

removing the issue from the place it has been since the founding: in the hands of state voters.

B.

Original meaning. All Justices, past and present, start their assessment of a case about the meaning of a constitutional provision by looking at how the provision was understood by the people who ratified it. If we think of the Constitution as a covenant between the governed and the governors, between the people and their political leaders, it is easy to appreciate the force of this basic norm of constitutional interpretation—that the originally understood meaning of the charter generally will be the lasting meaning of the charter. When two individuals sign a contract to sell a house, no one thinks that, years down the road, one party to the contract may change the terms of the deal. That is why the parties put the agreement in writing and signed it publicly—to prevent changed perceptions and needs from changing the guarantees in the agreement. So it normally goes with the Constitution: The written charter cements the limitations on government into an unbending bulwark, not a vane alterable whenever alterations occur—unless and until the people, like contracting parties, choose to change the contract through the agreed-upon mechanisms for doing so. *See* U.S. Const. art. V. If American lawyers in all manner of settings still invoke the original meaning of Magna Carta, a Charter for England in 1215, surely it is not too much to ask that they (and we) take seriously the original meaning of the United States Constitution, a Charter for this country in 1789. Any other approach, too lightly

followed, converts federal judges from interpreters of the document into newly commissioned authors of it.

Many precedents gauging individual rights and national power, leading to all manner of outcomes, confirm the import of original meaning in legal debates. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–80 (1803); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401–25 (1819); *Legal Tender Cases*, 79 U.S. 457, 536–38 (1870); *Myers v. United States*, 272 U.S. 52, 110–39 (1926); *INS v. Chadha*, 462 U.S. 919, 944–59 (1983); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–25 (1995); *Washington v. Glucksburg*, 521 U.S. 702, 710–19 (1997); *Crawford v. Washington*, 541 U.S. 36, 42–50 (2004); *Boumediene v. Bush*, 553 U.S. 723, 739–46 (2008); *Giles v. California*, 554 U.S. 353, 358–61 (2008); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008).

In trying to figure out the original meaning of a provision, it is fair to say, the line between interpretation and evolution blurs from time to time. That is an occupational hazard for judges when it comes to old or generally worded provisions. Yet that knotty problem does not confront us. Yes, the Fourteenth Amendment is old; the people ratified it in 1868. And yes, it is generally worded; it says: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Nobody in this case, however, argues that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage.

Tradition reinforces the point. Only months ago, the Supreme Court confirmed the significance of long-accepted usage in constitutional interpretation. In one case, the Court held that the customary practice of opening legislative meetings with prayer alone proves the constitutional permissibility of legislative prayer, quite apart from how that practice might fare under the most up-to-date Establishment Clause test. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818–20 (2014). In another case, the Court interpreted the Recess Appointments Clause based in part on long-accepted usage. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014). Applied here, this approach permits today's marriage laws to stand until the democratic processes say they should stand no more. From the founding of the Republic to 2003, every State defined marriage as a relationship between a man and a woman, meaning that the Fourteenth Amendment permits, though it does not require, States to define marriage in that way.

C.

Rational basis review. Doctrine leads to the same place as history. A first requirement of any law, whether under the Due Process or Equal Protection Clause, is that it rationally advance a legitimate government policy. *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Two words ("judicial restraint," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993)) and one principle (trust in the people that "even improvident decisions will eventually be rectified by the democratic process," *Vance*, 440 U.S. at 97) tell us all we need to know about the light touch judges should use in reviewing laws under this standard. So long as judges

can conceive of some "plausible" reason for the law—*any* plausible reason, even one that did not motivate the legislators who enacted it—the law must stand, no matter how unfair, unjust, or unwise the judges may consider it as citizens. *Heller v. Doe*, 509 U.S. 312, 330 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 11, 17–18 (1992).

A dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of the States. Hesitant, yes; but still a rational basis, some rational basis, must exist for the definition. What is it? Two at a minimum suffice to meet this low bar. One starts from the premise that governments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse. Imagine a society without marriage. It does not take long to envision problems that might result from an absence of rules about how to handle the natural effects of male-female intercourse: children. May men and women follow their procreative urges wherever they take them? Who is responsible for the children that result? How many mates may an individual have? How does one decide which set of mates is responsible for which set of children? That we rarely think about these questions nowadays shows only how far we have come and how relatively stable our society is, not that States have no explanation for creating such rules in the first place.

Once one accepts a need to establish such ground rules, and most especially a need to create stable family units for the planned and unplanned creation of children, one can well appreciate why the citizenry would think that a reasonable first concern of any society is the need to regulate male-female relationships and the unique procreative possibilities of them. One way to pursue this objective is to encourage couples to enter lasting relationships through subsidies and other benefits and to discourage them from ending such relationships through these and other means. People may not need the government's encouragement to have sex. And they may not need the government's encouragement to propagate the species. But they may well need the government's encouragement to create and maintain stable relationships within which children may flourish. It is not society's laws or for that matter any one religion's laws, but nature's laws (that men and women complement each other biologically), that created the policy imperative. And governments typically are not second-guessed under the Constitution for prioritizing how they tackle such issues. *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970).

No doubt, that is not the only way people view marriage today. Over time, marriage has come to serve another value—to solemnize relationships characterized by love, affection, and commitment. Gay couples, no less than straight couples, are capable of sharing such relationships. And gay couples, no less than straight couples, are capable of raising children and providing stable families for them. The quality of such relationships, and the capacity to raise children within them, turns not on sexual orientation but on

individual choices and individual commitment. All of this supports the policy argument made by many that marriage laws should be extended to gay couples, just as nineteen States have done through their own sovereign powers. Yet it does not show that the States, circa 2014, suddenly must look at this policy issue in just one way on pain of violating the Constitution.

The signature feature of rational basis review is that governments will not be placed in the dock for doing too much or for doing too little in addressing a policy question. *Id.* In a modern sense, crystallized at some point in the last ten years, many people now critique state marriage laws for doing too little—for being underinclusive by failing to extend the definition of marriage to gay couples. Fair enough. But rational basis review does not permit courts to invalidate laws every time a new and allegedly better way of addressing a policy emerges, even a better way supported by evidence and, in the Michigan case, by judicial factfinding. If legislative choices may rest on "rational speculation unsupported by evidence or empirical data," *Beach Commc'ns*, 508 U.S. at 315, it is hard to see the point of premising a ruling of unconstitutionality on factual findings made by one unelected federal judge that favor a different policy. Rational basis review does not empower federal courts to "subject" legislative line-drawing to "courtroom" factfinding designed to show that legislatures have done too much or too little. *Id.*

What we are left with is this: By creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay

together for purposes of rearing offspring. That does not convict the States of irrationality, only of awareness of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring. That explanation, still relevant today, suffices to allow the States to retain authority over an issue they have regulated from the beginning.

To take another rational explanation for the decision of many States not to expand the definition of marriage, a State might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries. That is not preserving tradition for its own sake. No one here claims that the States' original definition of marriage was unconstitutional when enacted. The plaintiffs' claim is that the States have acted irrationally in standing by the traditional definition in the face of changing social mores. Yet one of the key insights of federalism is that it permits laboratories of experimentation—accent on the plural—allowing one State to innovate one way, another State another, and a third State to assess the trial and error over time. As a matter of state law, the possibility of gay marriage became real in 2003 with the Massachusetts Supreme Judicial Court's decision in *Goodridge*. Eleven years later, the clock has not run on assessing the benefits and burdens of expanding the definition of marriage. Eleven years indeed is not even the right timeline. The fair question is whether in 2004, *one* year after *Goodridge*, Michigan voters could stand by the traditional definition of marriage. How can we say that the voters acted irrationally for sticking with the seen benefits of thousands of years of

adherence to the traditional definition of marriage in the face of one year of experience with a new definition of marriage? A State still assessing how this has worked, whether in 2004 or 2014, is not showing irrationality, just a sense of stability and an interest in seeing how the new definition has worked elsewhere. Even today, the only thing anyone knows *for sure* about the long-term impact of redefining marriage is that they do not know. A Burkean sense of caution does not violate the Fourteenth Amendment, least of all when measured by a timeline less than a dozen years long and when assessed by a system of government designed to foster step-by-step, not sudden winner-take-all, innovations to policy problems.

In accepting these justifications for the four States' marriage laws, we do not deny the foolish, sometimes offensive, inconsistencies that have haunted marital legislation from time to time. States will hand some people a marriage license no matter how often they have divorced or remarried, apparently on the theory that practice makes perfect. States will not even prevent an individual from remarrying the same person three or four times, where practice no longer seems to be the issue. With love and commitment nowhere to be seen, States will grant a marriage license to two friends who wish to share in the tax and other material benefits of marriage, at least until the State's no-fault divorce laws allow them to exit the partnership freely. And States allow couples to continue procreating no matter how little stability, safety, and love they provide the children they already have. Nor has unjustified sanctimony stayed off the stage when it comes to marital legislation—with monogamists who "do not monog" criticizing alleged

polygamists who "do not polyg." *See* Paul B. Beers, *Pennsylvania Politics Today and Yesterday* 51 (1980).

How, the claimants ask, could *anyone* possibly be unworthy of this civil institution? Aren't gay and straight couples both capable of honoring this civil institution in some cases and of messing it up in others? All of this, however, proves much too much. History is replete with examples of love, sex, and marriage tainted by hypocrisy. Without it, half of the world's literature, and three-quarters of its woe, would disappear. Throughout, we have never leveraged these inconsistencies about deeply personal, sometimes existential, views of marriage into a ground for constitutionalizing the field. Instead, we have allowed state democratic forces to fix the problems as they emerge and as evolving community mores show they should be fixed. Even if we think about today's issue and today's alleged inconsistencies solely from the perspective of the claimants in this case, it is difficult to call that formula, already coming to terms with a new view of marriage, a failure.

Any other approach would create line-drawing problems of its own. Consider how plaintiffs' love-and-commitment definition of marriage would fare under their own rational basis test. Their definition does too much because it fails to account for the reality that no State in the country requires couples, whether gay or straight, to be in love. Their definition does too little because it fails to account for plural marriages, where there is no reason to think that three or four adults, whether gay, bisexual, or straight, lack the capacity to share love, affection, and commitment, or for that matter lack the capacity to be capable (and

more plentiful) parents to boot. If it is constitutionally irrational to stand by the man-woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage. Plaintiffs have no answer to the point. What they might say they cannot: They might say that tradition or community mores provide a rational basis for States to stand by the monogamy definition of marriage, but they cannot say that because that is exactly what they claim is illegitimate about the States' male-female definition of marriage. The predicament does not end there. No State is free of marriage policies that go too far in some directions and not far enough in others, making all of them vulnerable—if the claimants' theory of rational basis review prevails.

Several cases illustrate just how seriously the federal courts must take the line-drawing deference owed the democratic process under rational basis review. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), holds that a State may require law enforcement officers to retire without exception at age fifty, in order to assure the physical fitness of its police force. If a rough correlation between age and strength suffices to uphold exception-free retirement ages (even though some fifty-year-olds swim/bike/run triathlons), why doesn't a correlation between male-female intercourse and procreation suffice to uphold traditional marriage laws (even though some straight couples don't have kids and many gay couples do)? *Armour v. City of Indianapolis*, 132 S. Ct. 2073 (2012), says that if a city cancels a tax, the bureaucratic hassle of issuing refunds entitles it to keep money already collected from citizens who paid early. If administrative convenience amounts to an adequate public purpose,

why not a rough sense of social stability? More deferential still, *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947), concludes that a State's interest in maintaining close ties among those who steer ships in its ports justifies denying pilotage licenses to anyone who isn't a friend or relative of an incumbent pilot. Can we honestly say that traditional marriage laws involve more irrationality than *nepotism*?

The debate over marriage of course has another side, and we cannot deny the costs to the plaintiffs of allowing the States to work through this profound policy debate. The traditional definition of marriage denies gay couples the opportunity to publicly solemnize, to say nothing of subsidize, their relationships under state law. In addition to depriving them of this status, it deprives them of benefits that range from the profound (the right to visit someone in a hospital as a spouse or parent) to the mundane (the right to file joint tax returns). These harms affect not only gay couples but also their children. Do the benefits of standing by the traditional definition of marriage make up for these costs? The question demands an answer—but from elected legislators, not life-tenured judges. Our task under the Supreme Court's precedents is to decide whether the law has some conceivable basis, not to gauge how that rationale stacks up against the arguments on the other side. Respect for democratic control over this traditional area of state expertise ensures that "a statewide deliberative process that enable[s] its citizens to discuss and weigh arguments for and against same-sex marriage" can have free and reasonable rein. *Windsor*, 133 S. Ct. at 2689.

D.

Animus. Given the broad deference owed the States under the democracy-reinforcing norms of rational basis review, the cases in which the Supreme Court has struck down a state law on that basis are few. When the Court has taken this step, it usually has been due to the novelty of the law and the targeting of a single group for disfavored treatment under it. In one case, a city enacted a new zoning code with the none-too-subtle purpose of closing down a home for the intellectually disabled in a neighborhood that apparently wanted nothing to do with them. The reality that the code applied only to homes for the intellectually disabled—and not to other dwellings such as fraternity houses—led the Court to invalidate the regulation on the ground that the city had based it upon "an irrational prejudice against the mentally retarded." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). In another case, a statewide initiative denied gays, and gays alone, access to the protection of the State's existing antidiscrimination laws. The novelty of the law, coupled with the distance between the reach of the law and any legitimate interest it might serve, showed that the law was "born of animosity toward" gays and suggested a design to make gays "unequal to everyone else." *Romer*, 517 U.S. at 634–35.

None of the statewide initiatives at issue here fits this pattern. The four initiatives, enacted between 2004 and 2006, codified a long-existing, widely held social norm already reflected in state law. "[M]arriage between a man and a woman," as the Court reminded us just last year, "had been thought of by most people

as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689.

Neither was the decision to place the definition of marriage in a State's constitution unusual, nor did it otherwise convey the kind of malice or unthinking prejudice the Constitution prohibits. Nineteen States did the same thing during that period. Human Rights Campaign Found., *Equality from State to State 2006*, at 13–14 (2006), *available at* http://s3.amazonaws.com/hrc-assets//files/assets/resources/StateToState2007.pdf. And if there was one concern animating the initiatives, it was the fear that the courts would seize control over an issue that people of good faith care deeply about. If that is animus, the term has no useful meaning.

Who in retrospect can blame the voters for having this fear? By then, several state courts had altered their States' traditional definitions of marriage under the States' constitutions. Since then, more have done the same. Just as state judges have the authority to construe a state constitution as they see fit, so do the people have the right to overrule such decisions or preempt them as they see fit. Nor is there anything static about this process. In some States, the people have since re-amended their constitutions to broaden the category of those eligible to marry. In other States, the people seemed primed to do the same but for now have opted to take a wait-and-see approach of their own as federal litigation proceeds. *See, e.g.*, Wesley Lowery, *Same-Sex Marriage Is Gaining Momentum, but Some Advocates Don't Want It on the Ballot in Ohio*, Wash. Post (June 14, 2014), http://www.washingtonpost.com/politics/same-sex-marriage-is-gaining-mom

entum-but-ohio-advocates-dont-want-it-on-the-ballot/2014/06/14/a090452a-e77e-11e3-afc6-a1dd9407abcf_story.html (explaining that Ohio same-sex marriage advocates opted not to place the question on the 2014 state ballot despite collecting nearly twice the number of required signatures). What the Court recently said about another statewide initiative that people care passionately about applies with equal vigor here: "Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014). "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 1637.

What of the possibility that other motivations affected the amendment process in the four States? If assessing the motives of multimember legislatures is difficult, assessing the motives of *all* voters in a statewide initiative strains judicial competence. The number of people who supported each initiative—Michigan (2.7 million), Kentucky (1.2 million), Ohio (3.3 million), and Tennessee (1.4 million)—was large and surely diverse. In addition to the proper role of the courts in a democracy, many other factors presumably influenced the voters who supported *and* opposed these amendments: that some politicians favored the amendment and others opposed it; that some faith groups favored the amendment and others opposed it; that some thought the amendment

would strengthen families and others thought it would weaken them or were not sure; that some thought the amendment would be good for children and others thought it would not be or were not sure; and that some thought the amendment would preserve a long-established definition of marriage and others thought it was time to accommodate gay couples. Even a rough sense of morality likely affected voters, with some thinking it immoral to exclude gay couples and others thinking the opposite. For most people, whether for or against the amendment, the truth of why they did what they did is assuredly complicated, making it impossible to pin down any one consideration, as opposed to a rough aggregation of factors, as motivating them. How in this setting can we indict the 2.7 million Michigan voters who supported the amendment in 2004, less than *one year* after the *first* state supreme court recognized a constitutional right to gay marriage, for favoring the amendment for prejudicial reasons and for prejudicial reasons alone? Any such conclusion cannot be squared with the benefit of the doubt customarily given voters and legislatures under rational basis review. Even the gay-rights community, remember, was not of one mind about taking on the benefits and burdens of marriage until the early 1990s. *See* George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* 58, 88 (2004); Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* 48–52 (2013). A decade later, a State's voters should not be taken to task for failing to be of one mind about the issue themselves.

Some equanimity is in order in assessing the motives of voters who invoked a constitutionally

respected vehicle for change and for resistance to change: direct democracy. *See Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912). Just as gay individuals are no longer abstractions, neither should we treat States as abstractions. Behind these initiatives were real people who teach our children, create our jobs, and defend our shores. Some of these people supported the initiative in 2004; some did not. It is no less unfair to paint the proponents of the measures as a monolithic group of hate-mongers than it is to paint the opponents as a monolithic group trying to undo American families. "Tolerance," like respect and dignity, is best traveled on a "two-way street." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). If there is a dominant theme to the Court's cases in this area, it is to end otherness, not to create new others.

All of this explains why the Court's decisions in *City of Cleburne* and *Romer* do not turn on reading the minds of city voters in one case or of statewide initiative supporters in the other. They turn on asking whether anything but prejudice to the affected class could explain the law. *See City of Cleburne*, 473 U.S. at 450; *Romer*, 517 U.S. at 635. No such explanations existed in those cases. Plenty exist here, as shown above and as recognized by many others. *See Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring in the judgment) ("Unlike the moral disapproval of same-sex relations[,] . . . other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."); *Bishop*, 760 F.3d at 1104–09 (Holmes, J., concurring) (same); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006) (enactment not "'inexplicable by anything but animus' towards same-sex couples"); *Conaway v. Deane*, 932

A.2d 571, 635 (Md. 2007) (no reason to "infer antipathy"); *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (those who favor the traditional definition are not "irrational, ignorant or bigoted"); *Andersen v. King Cnty.*, 138 P.3d 963, 981 (Wash. 2006) (en banc) ("the only reason" for the law was not "anti-gay sentiment").

One other point. Even if we agreed with the claimants that the nature of these state constitutional amendments, and the debates surrounding them, required their invalidation on animus grounds, that would not give them what they request in their complaints: the right to same-sex marriage. All that the invalidation of the amendments would do is return state law to where it had always been, a status quo that in all four States included state statutory and common law definitions of marriage applicable to one man and one woman—definitions that no one claims were motivated by ill will. The elimination of the state constitutional provisions, it is true, would allow individuals to challenge the four States' other marital laws on state constitutional grounds. No one filed such a challenge here, however.

E.

Fundamental right to marry. Under the Due Process Clause, courts apply more muscular review—"strict," "rigorous," usually unforgiving, scrutiny—to laws that impair "fundamental" rights. In considering the claimants' arguments that they have a fundamental right to marry each other, we must keep in mind that something can be fundamentally important without being a fundamental right under the Constitution. Otherwise, state regulations of many deeply important subjects—from education to

healthcare to living conditions to decisions about when to die—would be subject to unforgiving review. They are not. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (public education); *Maher v. Roe*, 432 U.S. 464, 469 (1977) (healthcare); *Lindsey v. Normet*, 405 U.S. 56, 73–74 (1972) (housing); *Glucksberg*, 521 U.S. at 728 (right to die). Instead, the question is whether our nation has treated the right as fundamental and therefore worthy of protection under substantive due process. More precisely, the test is whether the right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721 (internal citations omitted). That requirement often is met by placing the right in the Constitution, most obviously in (most of) the guarantees in the Bill of Rights. *See id.* at 720. But the right to marry in general, and the right to gay marriage in particular, nowhere appear in the Constitution. That route for recognizing a fundamental right to same-sex marriage does not exist.

That leaves the other option—that, even though a proposed right to same-sex marriage does not appear in the Constitution, it turns on bedrock assumptions about liberty. This too does not work. The first state high court to redefine marriage to include gay couples did not do so until 2003 in *Goodridge*.

Matters do not change because *Loving v. Virginia*, 388 U.S. 1 (1967), held that "marriage" amounts to a fundamental right. When the Court decided *Loving*, "marriage between a man and a woman no doubt [was] thought of . . . as essential to the very definition of that

term." *Windsor*, 133 S. Ct. at 2689. In referring to "marriage" rather than "opposite-sex marriage," *Loving* confirmed only that "opposite-sex marriage" would have been considered redundant, not that marriage included same-sex couples. *Loving* did not change the definition. That is why the Court said marriage is "fundamental to our very existence and survival," 388 U.S. at 12, a reference to the procreative definition of marriage. Had a gay African-American male and a gay Caucasian male been denied a marriage license in Virginia in 1968, would the Supreme Court have held that Virginia had violated the Fourteenth Amendment? No one to our knowledge thinks so, and no Justice to our knowledge has ever said so. The denial of the license would have turned not on the races of the applicants but on a request to change the definition of marriage. Had *Loving* meant something more when it pronounced marriage a fundamental right, how could the Court hold in *Baker* five years later that gay marriage does not even raise a substantial federal question? *Loving* addressed, and rightly corrected, an unconstitutional eligibility requirement for marriage; it did not create a new definition of marriage.

A similar problem confronts the claimants' reliance on other decisions treating marriage as a fundamental right, whether in the context of a statute denying marriage licenses to fathers who could not pay child support, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), or a regulation restricting prisoners' ability to obtain marriage licenses, *Turner v. Safley*, 482 U.S. 78, 94–95 (1987). It strains credulity to believe that a year after each decision a gay indigent father could have required the State to grant him a marriage license for his partnership or that a gay prisoner could have required

the State to permit him to marry a gay partner. When *Loving* and its progeny used the word marriage, they did not redefine the term but accepted its traditional meaning.

No doubt, many people, many States, even some dictionaries, now define marriage in a way that is untethered to biology. But that does not transform the fundamental-rights decision of *Loving* under the old definition into a constitutional right under the new definition. The question is whether the old reasoning applies to the new setting, not whether we can shoehorn new meanings into old words. Else, evolving-norm lexicographers would have a greater say over the meaning of the Constitution than judges.

The upshot of fundamental-rights status, keep in mind, is strict-scrutiny status, subjecting all state eligibility rules for marriage to rigorous, usually unforgiving, review. That makes little sense with respect to the trials and errors societies historically have undertaken (and presumably will continue to undertake) in determining who may enter and leave a marriage. Start with the *duration* of a marriage. For some, marriage is a commitment for life and beyond. For others, it is a commitment for life. For still others, it is neither. In 1969, California enacted the first pure no-fault divorce statute. *See* Family Law Act of 1969, 1969 Cal. Stat. 3312. A dramatic expansion of similar laws followed. *See* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. Rev. 79, 90. The Court has never subjected these policy fits and starts about who may *leave* a marriage to strict scrutiny.

Consider also the *number* of people eligible to marry. As late as the eighteenth century, "[t]he predominance of monogamy was by no means a foregone conclusion," and "[m]ost of the peoples and cultures around the globe" had adopted a different system. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 9 (2000). Over time, American officials wove monogamy into marriage's fabric. Beginning in the nineteenth century, the federal government "encouraged or forced" Native Americans to adopt the policy, and in 1878 the Supreme Court upheld a federal antibigamy law. *Id.* at 26; *see Reynolds v. United States*, 98 U.S. 145 (1878). The Court has never taken this topic under its wing. And if it did, how would the constitutional, as opposed to policy, arguments in favor of same-sex marriage not apply to plural marriages?

Consider finally the *nature* of the individuals eligible to marry. The age of consent has not remained constant, for example. Under Roman law, men could marry at fourteen, women at twelve. The American colonies imported that rule from England and kept it until the mid-1800s, when the people began advocating for a higher minimum age. Today, all but two States set the number at eighteen. *See* Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. Rev. 1817, 1824–32 (2012). The same goes for the social acceptability of marriage between cousins, a union deemed "desirable in many parts of the world"; indeed, around "10 percent of marriages worldwide are between people who are second cousins or closer." Sarah Kershaw, *Living Together: Shaking Off the Shame*, N.Y. Times (Nov. 25, 2009), http://www.nytimes

.com/2009/11/26/garden/26cousins.html. Even in the United States, cousin marriage was not prohibited until the mid-nineteenth century, when Kansas—followed by seven other States—enacted the first ban. *See* Diane B. Paul & Hamish G. Spencer, *"It's Ok, We're Not Cousins by Blood": The Cousin Marriage Controversy in Historical Perspective*, 6 PLoS Biology 2627, 2627 (2008). The States, however, remain split: half of them still permit the practice. *Ghassemi v. Ghassemi*, 998 So. 2d 731, 749 (La. Ct. App. 2008). Strict scrutiny? Neither *Loving* nor any other Supreme Court decision says so.

F.

Discrete and insular class without political power. A separate line of cases, this one under the Equal Protection Clause, calls for heightened review of laws that target groups whom legislators have singled out for unequal treatment in the past. This argument faces an initial impediment. Our precedents say that rational basis review applies to sexual-orientation classifications. *See Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260–61 (6th Cir. 2006); *Stemler v. City of Florence*, 126 F.3d 856, 873–74 (6th Cir. 1997).

There is another impediment. The Supreme Court has never held that legislative classifications based on sexual orientation receive heightened review and indeed has not recognized a new suspect class in more than four decades. There are ample reasons for staying the course. Courts consider four rough factors in deciding whether to treat a legislative classification as suspect and presumptively unconstitutional: whether

the group has been historically victimized by governmental discrimination; whether it has a defining characteristic that legitimately bears on the classification; whether it exhibits unchanging characteristics that define it as a discrete group; and whether it is politically powerless. *See Rodriguez*, 411 U.S. at 28.

We cannot deny the lamentable reality that gay individuals have experienced prejudice in this country, sometimes at the hands of public officials, sometimes at the hands of fellow citizens. Stonewall, Anita Bryant's uninvited answer to the question "Who are we to judge?", unequal enforcement of antisodomy laws between gay and straight partners, Matthew Shepard, and the language of insult directed at gays and others make it hard for anyone to deny the point. But we also cannot deny that the institution of marriage arose independently of this record of discrimination. The traditional definition of marriage goes back thousands of years and spans almost every society in history. By contrast, "American laws targeting same-sex couples did not develop until the last third of the 20th century." *Lawrence*, 539 U.S. at 570. This order of events prevents us from inferring from history that prejudice against gays led to the traditional definition of marriage in the same way that we can infer from history that prejudice against African Americans led to laws against miscegenation. The usual leap from history of discrimination to intensification of judicial review does not work.

Windsor says nothing to the contrary. In arguing otherwise, plaintiffs mistake *Windsor*'s avoidance of

one federalism question for avoidance of federalism altogether. Here is the key passage:

> Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. "'[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'"

Windsor, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633). Plaintiffs read these words (and others that follow) as an endorsement of heightened review in today's case, pointing to the first two sentences as proof that individual dignity, not federalism, animates *Windsor*'s holding.

Yet federalism permeates both parts of this passage and both parts of the opinion. *Windsor* begins by expressing doubts about whether Congress has the delegated power to enact a statute like DOMA at all.

But instead of resolving the case on the far-reaching enumerated-power ground, it resolves the case on the narrower *Romer* ground—that anomalous exercises of power targeting a single group raise suspicion that bigotry rather than legitimate policy is afoot. Why was DOMA anomalous? Only federalism can supply the answer. The national statute trespassed upon New York's time-respected authority to define the marital relation, including by "enhanc[ing] the recognition, dignity, and protection" of gay and lesbian couples. *Id.* Today's case involves no such "divest[ing]"/"depriv[ing]"/"undermin[ing]" of a marriage status granted through a State's authority over domestic relations within its borders and thus provides no basis for inferring that the purpose of the state law was to "impose a disadvantage"/"a separate status"/"a stigma" on gay couples. *Id.* at 2692–95. When the Framers "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (Kennedy, J., concurring), they did so to *enhance* liberty, not to allow the National Government to *divest* liberty protections granted by the States in the exercise of their historic and in this instance nearly exclusive power. What we have here is something entirely different. It is the States doing exactly what every State has been doing for hundreds of years: defining marriage as they see it. The only thing that has changed is the *willingness* of many States over the last eleven years to expand the definition of marriage to encompass gay couples.

Any other reading of *Windsor* would require us to subtract key passages from the opinion and add an inverted holding. The Court noted that New York "without doubt" had the power under its traditional authority over marriage to extend the definition of

marriage to include gay couples and that Congress had no power to enact "unusual" legislation that interfered with the States' long-held authority to define marriage. *Windsor*, 133 S. Ct. at 2692–93. A decision premised on heightened scrutiny under the Fourteenth Amendment that redefined marriage nationally to include same-sex couples not only would divest the States of their traditional authority over this issue, but it also would authorize Congress to do something no one would have thought possible a few years ago—to use its Section 5 enforcement powers to add new definitions and extensions of marriage rights in the years ahead. That would leave the States with little authority to resolve ever-changing debates about how to define marriage (and the benefits and burdens that come with it) outside the beck and call of Congress and the Court. How odd that one branch of the National Government (Congress) would be reprimanded for entering the fray in 2013 and two branches of the same Government (the Court and Congress) would take control of the issue a short time later.

Nor, as the most modest powers of observation attest, is this a setting in which "political powerlessness" requires "extraordinary protection from the majoritarian political process." *Rodriguez*, 411 U.S. at 28. This is not a setting in which dysfunction mars the political process. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). It is not a setting in which the recalcitrance of Jim Crow demands judicial, rather than we-can't-wait-forever legislative, answers. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). It is not a setting in which time shows that even a potentially powerful group cannot make headway on issues of equality. *See Frontiero v.*

Richardson, 411 U.S. 677 (1973). It is not a setting where a national crisis—the Depression—seemingly demanded constitutional innovation. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). And it is not a setting, most pertinently, in which the local, state, and federal governments historically disenfranchised the suspect class, as they did with African Americans and women. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Instead, from the claimants' perspective, we have an eleven-year record marked by nearly as many successes as defeats and a widely held assumption that the future holds more promise than the past—if the federal courts will allow that future to take hold. Throughout that time, other advances for the claimants' cause are manifest. Nationally, "Don't Ask, Don't Tell" is gone. Locally, the Cincinnati charter amendment that prevented gay individuals from obtaining certain preferences from the city, upheld by our court in 1997, *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), is no more. The Fourteenth Amendment does not insulate influential, indeed eminently successful, interest groups from a defining attribute of all democratic initiatives—some succeed, some fail—particularly when succeeding more and failing less are in the offing.

Why, it is worth asking, the sudden change in public opinion? If there is one thing that seems to challenge hearts and minds, even souls, on this issue, it is the transition from the abstract to the concrete. If twenty-five percent of the population knew someone who was openly gay in 1985, and seventy-five percent

knew the same in 2000, Klarman, *supra*, at 197, it is fair to wonder how few individuals still have not been forced to think about the matter through the lens of a gay friend or family member. *That* would be a discrete and insular minority.

The States' undoubted power over marriage provides an independent basis for reviewing the laws before us with deference rather than with skepticism. An analogy shows why. When a *state* law targets noncitizens—a group marked by its lack of political power and its history of enduring discrimination—it must in general meet the most demanding of constitutional tests in order to survive a skirmish with a court. But when a *federal* law targets noncitizens, a mere rational basis will save it from invalidation. This disparity arises because of the Nation's authority (and the States' corresponding lack of authority) over international affairs. *Mathews v. Diaz*, 426 U.S. 67, 84–85 (1976). If federal preeminence in foreign relations requires lenient review of federal immigration classifications, why doesn't state preeminence in domestic relations call for equally lenient review of state marriage definitions?

G.

Evolving meaning. If all else fails, the plaintiffs invite us to consider that "[a] core strength of the American legal system . . . is its capacity to evolve" in response to new ways of thinking about old policies. *DeBoer* Appellees' Br. at 57–58. But even if we accept this invitation and put aside the past—original meaning, tradition, time-respected doctrine—that does not take the plaintiffs where they wish to go. We could, to be sure, look at this case alongside evolving moral

and policy considerations. The Supreme Court has done so before. *Lawrence*, 539 U.S. at 573. It may do so again. "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights . . . to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). Why not do so here?

Even on this theory, the marriage laws do not violate the Constitution. A principled jurisprudence of constitutional evolution turns on evolution in *society's* values, not evolution in *judges'* values. Freed of federal-court intervention, thirty-one States would continue to define marriage the old-fashioned way. *Lawrence*, by contrast, dealt with a situation in which just thirteen States continued to prohibit sodomy, and even then most of those laws had fallen into desuetude, rarely being enforced at all. On this record, what right do we have to say that societal values, as opposed to judicial values, have evolved toward agreement in favor of same-sex marriage?

The theory of the living constitution rests on the premise that every generation has the right to govern itself. If that premise prevents judges from insisting on principles that society has moved past, so too should it prevent judges from anticipating principles that society has yet to embrace. It follows that States must enjoy some latitude in matters of timing, for reasonable people can disagree about just when public norms have evolved enough to require a democratic response. Today's case captures the point. Not long ago American society took for granted the rough correlation between marriage and creation of new life, a vision under which limiting marriage to opposite-sex couples seemed

natural. Not long from now, if current trends continue, American society may define marriage in terms of affirming mutual love, a vision under which the failure to add loving gay couples seems unfair. Today's society has begun to move past the first picture of marriage, but it has not yet developed a consensus on the second.

If, *before* a new consensus has emerged on a social issue, federal judges may decide when the time is ripe to recognize a new constitutional right, surely the people should receive some deference in deciding when the time is ripe to move from one picture of marriage to another. So far, not a single United States Supreme Court Justice in American history has written an opinion maintaining that the traditional definition of marriage violates the Fourteenth Amendment. No one would accuse the Supreme Court of acting irrationally in failing to recognize a right to same-sex marriage in 2013. Likewise, we should hesitate to accuse the States of acting irrationally in failing to recognize the right in 2004 or 2006 or for that matter today. Federal judges engaged in the inherent pacing that comes with living constitutionalism should appreciate the inherent pacing that comes with democratic majorities deciding within reasonable bounds when and whether to embrace an evolving, as opposed to settled, societal norm. The one form of pacing is akin to the other, making it anomalous for the Court to hold that the States act unconstitutionally when making reasonable pacing decisions of their own.

From time to time, the Supreme Court has looked beyond our borders in deciding when to expand the meaning of constitutional guarantees. *Lawrence*, 539 U.S. at 576. Yet foreign practice only reinforces the

impropriety of tinkering with the democratic process in this setting. The great majority of countries across the world—including such progressive democracies as Australia and Finland—still adhere to the traditional definition of marriage. Even more telling, the European Court of Human Rights ruled only a few years ago that European human rights laws do not guarantee a right to same-sex marriage. *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409. "The area in question," it explained in words that work just as well on this side of the Atlantic, remains "one of evolving rights with no established consensus," which means that States must "enjoy [discretion] in the timing of the introduction of legislative changes." *Id.* at 438. It reiterated this conclusion as recently as this July, declaring that "the margin of appreciation to be afforded" to States "must still be a wide one." *Hämäläinen v. Finland*, No. 37359/09, HUDOC, at *19 (Eur. Ct. H.R. July 16, 2014). Our Supreme Court relied on the European Court's gay-rights decisions in *Lawrence*. 539 U.S. at 576. What neutral principle of constitutional interpretation allows us to ignore the European Court's same-sex marriage decisions when deciding this case? If the point is relevant in the one setting, it is relevant in the other, especially in a case designed to treat like matters alike.

Other practical considerations also do not favor the creation of a new constitutional right here. While these cases present a denial of access to many benefits, what is "[o]f greater importance" to the claimants, as they see it, "is the loss of . . . dignity and respect" occasioned by these laws. *Love* Appellees' Br. at 5. No doubt there is much to be said for "dignity and respect" in the eyes of the Constitution and its interpreters. But any loss of

dignity and respect on this issue did not come from the Constitution. It came from the neighborhoods and communities in which gay and lesbian couples live, and in which it is worth trying to correct the problem in the first instance—and in that way "to allow the formation of consensus respecting the way the members" of a State "treat each other in their daily contact and constant interaction with each other." *Windsor*, 133 S. Ct. at 2692.

For all of the power that comes with the authority to interpret the United States Constitution, the federal courts have no long-lasting capacity to change what people think and believe about new social questions. If the plaintiffs are convinced that litigation is the best way to resolve today's debate and to change heads and hearts in the process, who are we to say? Perhaps that is not the only point, however. Yes, we cannot deny thinking the plaintiffs deserve better—earned victories through initiatives and legislation and the greater acceptance that comes with them. But maybe the American people too deserve better—not just in the sense of having a say through representatives in the legislature rather than through representatives in the courts, but also in the sense of having to come face to face with the issue. Rights need not be countermajoritarian to count. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88352, 78 Stat. 241. Isn't the goal to create a culture in which a majority of citizens dignify and respect the rights of minority groups through majoritarian laws rather than through decisions issued by a majority of Supreme Court Justices? It is dangerous and demeaning to the citizenry to assume that *we*, and only *we*, can fairly

understand the arguments for and against gay marriage.

Last, but not least, federal courts never expand constitutional guarantees in a vacuum. What one group wants on one issue from the courts today, another group will want on another issue tomorrow. The more the Court innovates under the Constitution, the more plausible it is for the Court to do still more—and the more plausible it is for other advocates on behalf of other issues to ask the Court to innovate still more. And while the expansion of liberal and conservative constitutional rights will solve, or at least sidestep, the amendment-difficulty problem that confronts many individuals and interest groups, it will exacerbate the judge-confirmation problem. Faith in democracy with respect to issues that the Constitution has not committed to the courts reinforces a different, more sustainable norm.

III.

Does the Constitution prohibit a State from denying recognition to same-sex marriages conducted in other States? That is the question presented in the two Ohio cases (*Obergefell* and *Henry*), one of the Kentucky cases (*Bourke*), and the Tennessee case (*Tanco*). Our answer to the first question goes a long way toward answering this one. If it is constitutional for a State to define marriage as a relationship between a man and a woman, it is also constitutional for the State to stand by that definition with respect to couples married in other States or countries.

The Constitution in general does not delineate when a State must apply its own laws and when it must

apply the laws of another State. Neither any federal statute nor federal common law fills the gap. Throughout our history, each State has decided for itself how to resolve clashes between its laws and laws of other sovereigns—giving rise to the field of conflict of laws. The States enjoy wide latitude in fashioning choice-of-law rules. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727–29 (1988); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307–08 (1981).

The plaintiffs in these cases do not claim that refusal to recognize out-of-state gay and lesbian marriages violates the Full Faith and Credit Clause, the principal constitutional limit on state choice-of-law rules. Wisely so. The Clause "does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979). If defining marriage as an opposite-sex relationship amounts to a legitimate public policy—and we have just explained that it does—the Full Faith and Credit Clause does not prevent a State from applying that policy to couples who move from one State to another.

The plaintiffs instead argue that failure to recognize gay marriages celebrated in other States violates the Due Process and Equal Protection Clauses. But we do not think that the invocation of these different clauses justifies a different result. As shown, compliance with the Due Process and Equal Protection Clauses in this setting requires only a rational relationship between the legislation and a legitimate public purpose. And a State does not behave irrationally by insisting upon its own definition of marriage rather than deferring to the definition adopted by another State. Preservation of a

State's authority to recognize, or to opt not to recognize, an out-of-state marriage preserves a State's sovereign interest in deciding for itself how to define the marital relationship. It also discourages evasion of the State's marriage laws by allowing individuals to go to another State, marry there, then return home. Were it irrational for a State to adhere to its own policy, what would be the point of the Supreme Court's repeated holdings that the Full Faith and Credit Clause "does not require a State to apply another State's law in violation of its own public policy"? *Id.*

Far from undermining these points, *Windsor* reinforces them. The case observes that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities." 133 S. Ct. at 2691 (internal quotation marks omitted). How could it be irrational for a State to decide that the foundation of its domestic-relations law will be *its* definition of marriage, not somebody else's? *Windsor* adds that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders." *Id.* How could it be irrational for a State to apply its definition of marriage to a couple in whose marital status the State as a sovereign has a rightful and legitimate concern?

Nor does the policy of nonrecognition trigger *Windsor*'s (or *Romer*'s) principle that unprecedented exercises of power call for judicial skepticism. States have always decided for themselves when to yield to laws of other States. Exercising this power, States

often have refused to enforce all sorts of out-of-state rules on the grounds that they contradict important local policies. *See* Restatement (First) of Conflict of Laws § 612; Restatement (Second) of Conflict of Laws § 90. Even more telling, States in many instances have refused to recognize marriages performed in other States on the grounds that these marriages depart from cardinal principles of the State's domestic-relations laws. *See* Restatement (First) of Conflict of Laws § 134; Restatement (Second) of Conflict of Laws § 283. The laws challenged here involve routine rather than anomalous uses of state power.

What of the reality that Ohio recognizes some heterosexual marriages solemnized in other States even if those marriages could not be performed in Ohio? *See, e.g.*, *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958). The only reason Ohio could have for banning recognition of same-sex marriages performed elsewhere and not prohibiting heterosexual marriages performed elsewhere, the Ohio plaintiffs claim, is animus or "discrimination[] of an unusual character." *Obergefell* Appellees' Br. at 18 (quoting *Windsor*, 133 S. Ct. at 2692).

But, in making this argument, the plaintiffs misapprehend Ohio law, wrongly assuming that Ohio would recognize as valid *any* heterosexual marriage that was valid in the State that sanctioned it. That is not the case. Ohio law recognizes some out-of-state marriages that could not be performed in Ohio, but not all such marriages. *See, e.g.*, *Mazzolini*, 155 N.E.2d at 208 (marriage of first cousins); *Hardin v. Davis*, 16 Ohio Supp. 19, 20 (Ohio Ct. Com. Pl. 1945) (marriage

by proxy). In *Mazzolini*, the most relevant precedent, the Ohio Supreme Court stated that a number of heterosexual marriages—ones that were "incestuous, polygamous, shocking to good morals, unalterably opposed to a well defined public policy, or prohibited"—would not be recognized in the State, even if they were valid in the jurisdiction that performed them. 155 N.E.2d at 208–09 (noting that first-cousin marriages fell outside this rule because they were "not made void by explicit provision" and "not incestuous"). Ohio law declares same-sex marriage contrary to the State's public policy, placing those marriages within the longstanding exception to Ohio's recognition rule. *See* Ohio Rev. Code § 3101.01(C).

IV.

That leaves one more claim, premised on the constitutional right to travel. In the Tennessee case (*Tanco*) and one of the Ohio cases (*Henry*), the claimants maintain that a State's refusal to recognize out-of-state same-sex marriages illegitimately burdens the right to travel—in the one case by penalizing couples who move into the State by refusing to recognize their marriages, in the other by preventing their child from obtaining a passport because the State refused to provide a birth certificate that included the names of both parents.

The United States Constitution does not mention a right to travel by name. "Yet the constitutional right to travel from one State to another is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (internal quotation marks omitted). It provides three guarantees: (1) "the right of a citizen of one State to enter and to leave another State"; (2) "the right to be

treated as a welcome visitor rather than an unfriendly alien" when visiting a second State; and (3) the right of new permanent residents "to be treated like other citizens of that State." *Id.* at 500.

Tennessee's nonrecognition law does not violate these prohibitions. It does not ban, or for that matter regulate, movement into or out of the State other than in the respect all regulations create incentives or disincentives to live in one place or another. Most critically, the law does not punish out-of-state new residents in relation to its own born and bred. Nonresidents are "treated" just "like other citizens of that State," *id.*, because the State has not expanded the definition of marriage to include gay couples in all settings, whether the individuals just arrived in Tennessee or descend from Andrew Jackson.

The same is true for the Ohio law. No regulation of movement or differential treatment between the newly resident and the longstanding resident occurs. All Ohioans must follow the State's definition of marriage. With respect to the need to obtain an Ohio birth certificate before obtaining a passport, they can get one. The certificate just will not include both names of the couple. The "just" of course goes to the heart of the matter. In that respect, however, it is due process and equal protection, not the right to travel, that govern the issue.

* * *

This case ultimately presents *two* ways to think about change. One is whether the Supreme Court will constitutionalize a new definition of marriage to meet new policy views about the issue. The other is whether

the Court will begin to undertake a different form of change—change in the way we as a country optimize the handling of efforts to address requests for new civil liberties.

If the Court takes the first approach, it may resolve the issue for good and give the plaintiffs and many others relief. But we will never know what might have been. If the Court takes the second approach, is it not possible that the traditional arbiters of change—the people—will meet today's challenge admirably and settle the issue in a productive way? In just eleven years, nineteen States and a conspicuous District, accounting for nearly forty-five percent of the population, have exercised their sovereign powers to expand a definition of marriage that until recently was universally followed going back to the earliest days of human history. That is a difficult timeline to criticize as unworthy of further debate and voting. When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers. Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way.

For these reasons, we reverse.

DISSENT

MARTHA CRAIG DAUGHTREY, Circuit Judge, dissenting.

"The great tides and currents which engulf the rest of men do not turn aside in their course to pass the judges by."

Benjamin Cardozo, *The Nature of the Judicial Process* (1921)

The author of the majority opinion has drafted what would make an engrossing TED Talk or, possibly, an introductory lecture in Political Philosophy. But as an appellate court decision, it wholly fails to grapple with the relevant constitutional question in this appeal: whether a state's constitutional prohibition of same-sex marriage violates equal protection under the Fourteenth Amendment. Instead, the majority sets up a false premise—that the question before us is "who should decide?"—and leads us through a largely irrelevant discourse on democracy and federalism. In point of fact, the real issue before us concerns what is at stake in these six cases for the individual plaintiffs and their children, and what should be done about it. Because I reject the majority's resolution of these questions based on its invocation of *vox populi* and its reverence for "proceeding with caution" (otherwise known as the "wait and see" approach), I dissent.

In the main, the majority treats both the issues and the litigants here as mere abstractions. Instead of recognizing the plaintiffs as persons, suffering actual

harm as a result of being denied the right to marry where they reside or the right to have their valid marriages recognized there, my colleagues view the plaintiffs as social activists who have somehow stumbled into federal court, inadvisably, when they should be out campaigning to win "the hearts and minds" of Michigan, Ohio, Kentucky, and Tennessee voters to their cause. But these plaintiffs are not political zealots trying to push reform on their fellow citizens; they are committed same-sex couples, many of them heading up *de facto* families, who want to achieve equal status—*de jure* status, if you will—with their married neighbors, friends, and coworkers, to be accepted as contributing members of their social and religious communities, and to be welcomed as fully legitimate parents at their children's schools. They seek to do this by virtue of exercising a civil right that most of us take for granted—the right to marry.[1]

Readers who are familiar with the Supreme Court's recent opinion in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and its progeny in the circuit courts, particularly the Seventh Circuit's opinion in *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014) ("Formally these cases are about discrimination against the small homosexual minority in the United States. But at a

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[1] *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.") (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). The Supreme Court has described the right to marry as "of fundamental importance for all individuals" and as "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

deeper level, . . . they are about the welfare of American children."), must have said to themselves at various points in the majority opinion, "But what about the children?" I did, and I could not find the answer in the opinion. For although my colleagues in the majority pay lip service to marriage as an institution conceived for the purpose of providing a stable family unit "within which children may flourish," they ignore the destabilizing effect of its absence in the homes of tens of thousands of same-sex parents throughout the four states of the Sixth Circuit.

Indeed, with the exception of Ohio, the defendants in each of these cases—the proponents of their respective "defense of marriage" amendments—spent virtually their entire oral arguments professing what has come to be known as the "irresponsible procreation" theory: that limiting marriage and its benefits to opposite-sex couples is rational, even necessary, to provide for "unintended offspring" by channeling their biological procreators into the bonds of matrimony. When we asked counsel why that goal required the simultaneous exclusion of same-sex couples from marrying, we were told that permitting same-sex marriage might denigrate the institution of marriage in the eyes of opposite-sex couples who conceive out of wedlock, causing subsequent abandonment of the unintended offspring by one or both biological parents. We also were informed that because same-sex couples cannot themselves produce wanted or unwanted offspring, and because they must therefore look to non-biological means of parenting that require planning and expense, stability in a family unit headed by same-sex parents is assured without the benefit of formal matrimony. But, as the court in

Baskin pointed out, many "abandoned children [born out of wedlock to biological parents] are adopted by homosexual couples, and those children would be better off both emotionally and economically if their adoptive parents were married." *Id.* How ironic that irresponsible, unmarried, opposite-sex couples in the Sixth Circuit who produce unwanted offspring must be "channeled" into marriage and thus rewarded with its many psychological and financial benefits, while same-sex couples who become model parents are punished for their responsible behavior by being denied the right to marry. As an obviously exasperated Judge Posner responded after puzzling over this same paradox in *Baskin*, "Go figure." *Id.* at 662.

In addressing the "irresponsible procreation" argument that has been referenced by virtually every state defendant in litigation similar to this case, the *Baskin* court noted that estimates put the number of American children being raised by same-sex parents at over 200,000. *Id.* at 663. "Unintentional offspring are the children most likely to be put up for adoption," *id.* at 662, and because statistics show that same-sex couples are many times more likely to adopt than opposite-sex couples, "same-sex marriage improves the prospects of unintended children by increasing the number and resources of prospective adopters." *Id.* at 663. Moreover, "[i]f marriage is better for children who are being brought up by their biological parents, it must be better for children who are being brought up by their adoptive parents." *Id.* at 664.

The concern for the welfare of children that echoes throughout the *Baskin* opinion can be traced in part to the earlier opinion in *Windsor*, in which the Supreme

Court struck down, as unconstitutional on equal-protection grounds, section 3 of the federal Defense of Marriage Act (DOMA), which defined the term "marriage" for federal purposes as "mean[ing] only a legal union between one man and one woman as husband and wife," and the term "spouse" as "refer[ring] only to a person of the opposite sex who is a husband or a wife." *Id.* at 2683 (citing 1 U.S.C. § 7). Although DOMA did not affect the prerogative of the states to regulate marriage within their respective jurisdictions, it did deprive same-sex couples whose marriages were considered valid under state law of myriad federal benefits. As Justice Kennedy, writing for the majority, pointed out:

> DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency . . . . The differentiation demeans the [same-sex] couple, whose moral and sexual choices the Constitution protects, see *Lawrence* [*v. Texas*], 539 U.S. 558 [(2003)], and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Id. at 2694.

Looking more closely at the situation of just one of the same-sex couples from the six cases before us

brings Justice Kennedy's words on paper to life. Two of the Michigan plaintiffs, April DeBoer and Jayne Rowse, are unmarried, same-sex partners who have lived as a couple for eight years in a home they own together. They are both trained and employed as nurses, DeBoer in a hospital neonatal department and Rowse in an emergency department at another hospital. Together they are rearing three children but, due to existing provisions in Michigan's adoption laws, DeBoer and Rowse are prohibited from adopting the children as joint parents because they are unmarried. Instead, Rowse alone adopted two children, who are identified in the record as N and J. DeBoer adopted the third child, who is identified as R.

All three children had difficult starts in life, and two of them are now characterized as "special needs" children. N was born on January 25, 2009, to a biological mother who was homeless, had psychological impairments, was unable to care for N, and subsequently surrendered her legal rights to N. The plaintiffs volunteered to care for the boy and brought him into their home following his birth. In November 2009, Rowse completed the necessary steps to adopt N legally.

Rowse also legally adopted J after the boy's foster care agency asked Rowse and DeBoer initially to serve as foster parents and legal guardians for him, despite the uphill climb the baby faced. According to the plaintiffs' amended complaint:

> J was born on November 9, 2009, at Hutzel Hospital, premature at 25 weeks, to a drug addicted prostitute. Upon birth, he weighed 1 pound, 9 ounces and tested positive for

> marijuana, cocaine, opiates and methadone. His birth mother abandoned him immediately after delivery. J remained in the hospital in the NICU for four months with myriad different health complications, and was not expected to live. If he survived, he was not expected to be able to walk, speak or function on a normal level in any capacity. . . . With Rowse and DeBoer's constant care and medical attention, many of J's physical conditions have resolved.

The third adopted child, R, was born on February 1, 2010, to a 19-year-old girl who received no prenatal care and who gave birth at her mother's home before bringing the infant to the hospital where plaintiff DeBoer worked. R continues to experience issues related to her lack of prenatal care, including delayed gross motor skills. She is in a physical-therapy program to address these problems.

Both DeBoer and Rowse share in the responsibilities of raising the two four-year-olds and the five-year-old. The plaintiffs even have gone so far as to "coordinate their work schedules so that at least one parent is generally home with the children" to attend to their medical needs and perform other parental duties. Given the close-knit, loving environment shared by the plaintiffs and the children, DeBoer wishes to adopt N and J legally as a second parent, and Rowse wishes to adopt R legally as her second parent.

Although Michigan statutes allow married couples and single persons to adopt, those laws preclude unmarried couples from adopting each other's children. As a result, DeBoer and Rowse filed suit in federal

district court challenging the Michigan adoption statute, Michigan Compiled Laws § 710.24, on federal equal-protection grounds. They later amended their complaint to include a challenge to the so-called Michigan Marriage Amendment, *see* Mich. Const. art. I, § 25, added to the Michigan state constitution in 2004, after the district court suggested that the plaintiffs' "injury was not traceable to the defendants' enforcement of section [710.24]" but, rather, flowed from the fact that the plaintiffs "were not married, and any legal form of same-sex union is prohibited" in Michigan. The case went to trial on the narrow legal issue of whether the amendment could survive rational basis review, *i.e.*, whether it proscribes conduct in a manner that is rationally related to any conceivable legitimate governmental purpose.

The bench trial lasted for eight days and consisted of testimony from sociologists, economists, law professors, a psychologist, a historian, a demographer, and a county clerk. Included in the plaintiffs' presentation of evidence were statistics regarding the number of children in foster care or awaiting adoption, as well as testimony regarding the difficulties facing same-sex partners attempting to retain parental influence over children adopted in Michigan. Gary Gates, a demographer, and Vivek Sankaran, the director of both the Child Advocacy Law Clinic and the Child Welfare Appellate Clinic at the University of Michigan Law School, together offered testimony painting a grim picture of the plight of foster children and orphans in the state of Michigan. For example, Sankaran noted that just under 14,000 foster children reside in Michigan, with approximately 3,500 of those being legal orphans. Nevertheless, same-sex couples in

the state are not permitted to adopt such children as a couple. Even though one person can legally adopt a child, should anything happen to that adoptive parent, there is no provision in Michigan's legal framework that would "ensure that the children would necessarily remain with the surviving non-legal parent," even if that parent went through the arduous, time-consuming, expensive adoption-approval process. Thus, although the State of Michigan would save money by moving children from foster care or state care into adoptive families, and although same-sex couples in Michigan are almost three times more likely than opposite-sex couples to be raising an adopted child and twice as likely to be fostering a child, there remains a legal disincentive for same-sex couples to adopt children there.

David Brodzinsky, a developmental and clinical psychologist, for many years on the faculty at Rutgers University, reiterated the testimony that Michigan's ban on adoptions by same-sex couples increases the potential risks to children awaiting adoptions. The remainder of his testimony was devoted to a systematic, statistic-based debunking of studies intimating that children raised in gay or lesbian families, *ipso facto*, are less well-adjusted than children raised by heterosexual couples. Brodzinsky conceded that marriage brings societal legitimatization and stability to children but noted that he found no statistically significant differences in general characteristics or in development between children raised in same-sex households and children raised in opposite-sex households, and that the psychological well-being, educational development, and peer

relationships were the same in children raised in gay, lesbian, or heterosexual homes.

Such findings led Brodzinsky to conclude that the gender of a parent is far less important than the quality of the parenting offered and that family processes and resources are far better predictors of child adjustment than the family structure. He testified that those studies presuming to show that children raised in gay and lesbian families exhibited more adjustment problems and decreased educational achievement were seriously flawed, simply because they relied on statistics concerning children who had come from families experiencing a prior traumatic breakup of a failed heterosexual relationship. In fact, when focusing upon children of lesbian families created through donor insemination, Brodzinsky found no differences in comparison with children from donor insemination in heterosexual families or in comparison with children conceived naturally in heterosexual families. According to Brodzinsky, such a finding was not surprising given the fact that all such children experienced no family disruption in their past. For the same reason, few differences were noted in studies of children adopted at a very early age by same-sex couples and children naturally born into heterosexual families.

Nancy Cott, a professor of history at Harvard University, the director of graduate studies there, and the author of Public Vows: A History of Marriage and the Nation, also testified on behalf of the plaintiffs. She explained how the concept of marriage and the roles of the marriage partners have changed over time. As summarized by Cott, the wife's identity is no longer

subsumed into that of her husband, interracial marriages are legal now that the antiquated, racist concept of preserving the purity of the white race has fallen into its rightful place of dishonor, and traditional gender-assigned roles are no longer standard. Cott also testified that solemnizing marriages between same-sex partners would create tangible benefits for Michigan citizens because spouses would then be allowed to inherit without taxation and would be able to receive retirement, Social Security, and veteran's benefits upon the death of an eligible spouse. Moreover, statistics make clear that heterosexual marriages have not suffered or decreased in number as a result of states permitting same-sex marriages. In fact, to the contrary, Cott noted that there exists some evidence that many young people now refuse to enter into heterosexual marriages until their gay or lesbian friends can also enjoy the legitimacy of state-backed marriages.

Michael Rosenfeld, a Stanford University sociologist, testified about studies he had undertaken that confirmed the hypothesis that legitimation of same-sex relationships promotes their stability. Specifically, Rosenfeld's research established that although same-sex couples living in states without recognition of their commitments to each other did have a higher break-up rate than heterosexual married couples, the break-up rates of opposite-sex married couples and same-sex couples in recognized civil unions were virtually identical. Similarly, the break-up rates of same-sex couples not living in a state-recognized relationship approximated the break-up rate of heterosexual couples cohabiting without marriage.

Rosenfeld also criticized the methodology of studies advanced by the defendants that disagreed with his conclusions. According to Rosenfeld, those critical studies failed to take into account the stability or lack of stability of the various groups examined. For example, he testified that one such study compared children who had experienced no adverse family transitions with children who had lived through many such traumatic family changes. Not surprisingly, children from broken homes with lower-income-earning parents who had less education and lived in urban areas performed more poorly in school than other children. According to Rosenfeld, arguments to the contrary that failed to control for such differences, taken to their extreme, would lead to the conclusion that only high-income individuals of Asian descent who earned advanced degrees and lived in suburban areas should be allowed to marry.

To counteract the testimony offered by the plaintiffs' witnesses, the defendants presented as witnesses the authors or co-authors of three studies that disagreed with the conclusions reached by the plaintiffs' experts. All three studies, however, were given little credence by the district court because of inherent flaws in the methods used or the intent of the authors. For example, the New Family Structures Study reported by Mark Regnerus, a sociologist at the University of Texas at Austin, admittedly relied upon interviews of children from gay or lesbian families who were products of broken heterosexual unions in order to support a conclusion that living with such gay or lesbian families adversely affected the development of the children. Regnerus conceded, moreover, that his own department took the highly unusual step of issuing the following

statement on the university website in response to the release of the study:

> [Dr. Regnerus's opinions] do not reflect the views of the sociology department of the University of Texas at Austin. Nor do they reflect the views of the American Sociological Association which takes the position that the conclusions he draws from his study of gay parenting are fundamentally flawed on conceptual and methodological grounds and that the findings from Dr. Regnerus'[s] work have been cited inappropriately in efforts to diminish the civil rights and legitimacy of LBGTQ partners and their families.

In fact, the record before the district court reflected clearly that Regnerus's study had been funded by the Witherspoon Institute, a conservative "think tank" opposed to same-sex marriage, in order to vindicate "the traditional understanding of marriage."

Douglas Allen, the co-author of another study with Catherine Pakaluk and Joe Price, testified that children raised by same-sex couples graduated from high school at a significantly lower rate than did children raised by heterosexual married couples. On cross-examination, however, Allen conceded that "many of those children who . . . were living in same-sex households had previously lived in an opposite sex household where their parents had divorced, broken up, some kind of separation or transition." Furthermore, Allen provided evidence of the bias inherent in his study by admitting that he believed that engaging in homosexual acts "means eternal separation from God, in other words[,] going to hell."

The final study advanced by the defendants was conducted by Loren Marks, a professor in human ecology at Louisiana State University, in what was admittedly an effort to counteract the "groupthink" portrayed by perceived "liberal psychologists." But although Marks criticized what he perceived to be "a pronounced liberal lean on social issues" by many psychologists, he revealed his own bias by acknowledging that he was a lay clergyman in the Church of Jesus Christ of Latter Day Saints (LDS) and that the LDS directive "for a couple to be married by God's authority in God's house, the holy temple, and then to have children per the teaching that God's commandment for his children to multiply and replenish the earth remains in force."

Presented with the admitted biases and methodological shortcomings prevalent in the studies performed by the defendant's experts, the district court found those witnesses "largely unbelievable" and not credible. *DeBoer v. Snyder*, 973 F. Supp.2d 757, 768 (E.D. Mich. 2014). Proceeding to a legal analysis of the core issue in the litigation, the district court then concluded that the proscriptions of the marriage amendment are not rationally related to any legitimate state interest. Addressing the defendants' three asserted rational bases for the amendment,[2] the

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[2] In the district court, the state did not advance an "unintended pregnancy" argument, nor was that claim included in the state's brief on appeal, although counsel did mention it during oral argument. In terms of "optimal environment," the state emphasized the need for children to have "both a mom and a dad," because "men and women are different," and to have a "biological connection to their parents."

district court found each such proffered justification without merit.

Principally, the court determined that the amendment is in no way related to the asserted state interest in ensuring an optimal environment for child-rearing. The testimony adduced at trial clearly refuted the proposition that, all things being equal, same-sex couples are less able to provide for the welfare and development of children. Indeed, marriage, whether between same-sex or opposite-sex partners, increases stability within the family unit. By permitting same-sex couples to marry, that stability would not be threatened by the death of one of the parents. Even more damning to the defendants' position, however, is the fact that the State of Michigan allows heterosexual couples to marry even if the couple does not wish to have children, even if the couple does not have sufficient resources or education to care for children, even if the parents are pedophiles or child abusers, and even if the parents are drug addicts.

Furthermore, the district court found no reason to believe that the amendment furthers the asserted state interests in "proceeding with caution" before "altering the traditional definition of marriage" or in "upholding tradition and morality." As recognized by the district court, there is no legitimate justification for delay when constitutional rights are at issue, and even adherence to religious views or tradition cannot serve to strip citizens of their right to the guarantee of equal protection under the law.

Finally, and relatedly, the district court acknowledged that the regulation of marriage traditionally has been seen as part of a state's police

power but concluded that this fact cannot serve as an excuse to ignore the constitutional rights of individual citizens. Were it otherwise, the court observed, the prohibition in Virginia and in many other states against miscegenation still would be in effect today. Because the district court found that "regardless of whoever finds favor in the eyes of the most recent majority, the guarantee of equal protection must prevail," the court held the amendment and its implementing statutes "unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." *Id.* at 775.

If I were in the majority here, I would have no difficulty in affirming the district court's opinion in *DeBoer*. The record is rich with evidence that, as a pragmatic matter, completely refutes the state's effort to defend the ban against same-sex marriage that is inherent in the marriage amendment. Moreover, the district court did a masterful job of supporting its legal conclusions. Upholding the decision would also control the resolution of the other five cases that were consolidated for purposes of this appeal.

Is a thorough explication of the legal basis for such a result appropriate? It is, of course. Is it necessary? In my judgment, it is not, given the excellent—even eloquent—opinion in *DeBoer* and in the opinions that have come from four other circuits in the last few months that have addressed the same issues involved here: *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (holding Utah statutes and state constitutional amendment banning same-sex marriage unconstitutional under the Fourteenth Amendment);

Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014) (same, Virginia); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (same, Indiana statute and Wisconsin state constitutional amendment); and *Latta v. Otter*, Nos. 14-35420, 14-35421, 12-17668, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (same, Idaho and Nevada statutes and state constitutional amendments).[3]

Kitchen was decided primarily on the basis of substantive due process, based on the Tenth Circuit's determination that under Supreme Court precedents, the right to marry includes the right to marry the person of one's choice. The court located the source of that right in Supreme Court opinions such as *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (recognizing marriage as "the most important relation in life"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the liberty protected by the Fourteenth Amendment includes the freedom "to marry, establish a home and bring up children"); *Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Zablocki*, 434 U.S. at 384 (recognizing that "the right to marry is of fundamental importance for all individuals"); and *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (in the context of a prison

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[3] On October 6, the Supreme Court denied *certiorari* and lifted stays in *Kitchen*, *Bostic*, and *Baskin*, putting into effect the district court injunctions entered in each of those three cases. A stay of the mandate in the Idaho case in *Latta* also has been vacated, and the appeal in the Nevada case is not being pursued. As a result, marriage licenses are currently being issued to same-sex couples throughout most—if not all—of the Fourth, Seventh, Ninth, and Tenth Circuits.

inmate's right to marry, "[such] marriages are expressions of emotional support and public commitment[,] . . . elements [that] are important and significant aspects of the marital relationship" even in situations in which procreation is not possible). *Kitchen*, 755 F.3d at 1209-11. The Tenth Circuit also found that the Utah laws violated equal protection, applying strict scrutiny because the classification in question impinged on a fundamental right. In doing so, the court rejected the state's reliance on various justifications offered to establish a compelling state interest in denying marriage to same-sex couples, finding "an insufficient causal connection" between the prohibition on same-sex marriage and the state's "articulated goals," which included a purported interest in fostering biological reproduction, encouraging optimal childrearing, and maintaining gendered parenting styles. *Id.* at 1222. The court also rejected the state's prediction that legalizing same-sex marriage would result in social discord, citing *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963) (rejecting "community confusion and turmoil" as a reason to delay desegregation of public parks). *Id.* at 1227.

The Fourth Circuit in *Bostic* also applied strict scrutiny to strike down Virginia's same-sex-marriage prohibitions as infringing on a fundamental right, citing *Loving* and observing that "[o]ver the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms." 760 F.3d at 376. In a thoughtful opinion, the court analyzed each of the state's proffered interests: maintaining control of the "definition of marriage," adhering to the "tradition of opposite-sex marriage," "protecting the institution of

marriage," "encouraging responsible procreation," and "promoting the optimal childrearing environment." *Id.* at 378. In each instance, the court found that there was no link between the state's purported "compelling interest" and the exclusion of same-sex couples "from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Id.* at 384. As to the state's interest in federalism, the court pointed to the long-recognized principle that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons," *id.* at 379 (quoting *Windsor*, 133 S. Ct. at 2691), and highlighted *Windsor*'s reiteration of "*Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." *Id.* Addressing the state's contention that marriage under state law should be confined to opposite-sex couples because unintended pregnancies cannot result from same-sex unions, the court noted that "[b]ecause same-sex couples and infertile opposite-sex couples are similarly situated, the Equal Protection Clause counsels against treating these groups differently." *Id.* at 381-82 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

The Seventh Circuit's *Baskin* opinion is firmly grounded in equal-protection analysis. The court proceeded from the premise that "[d]iscrimination by a state or the federal government against a minority, when based on an immutable characteristic of the members of that minority (most familiarly skin color and gender), and occurring against an historical background of discrimination against the persons who have that characteristic, makes the discriminatory law

or policy constitutionally suspect." 766 F.3d at 654. But the court also found that "discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny." *Id.* at 656. This conclusion was based on the court's rejection of "the only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended," an argument "so full of holes that it cannot be taken seriously." *Id.* (emphasis in original). The court therefore found it unnecessary to engage in "the more complex analysis found in more closely balanced equal-protection cases" or under the due process clause of the Fourteenth Amendment." *Id.* at 656-57.

The Ninth Circuit's opinion in *Latta* also focuses on equal-protection principles in finding that Idaho's and Nevada's statutes and constitutional amendments prohibiting same-sex marriage violate the Fourteenth Amendment. Because the Ninth Circuit had recently held in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014), that classifications based on sexual orientation are subject to heightened scrutiny, a conclusion the court drew from its reading of *Windsor* to require assessment more rigorous than rational-basis review, the path to finding an equal-protection violation was less than arduous. As did the Tenth Circuit in *Kitchen*, the court in *Latta* found it "wholly illogical" to think that same-sex marriage would affect opposite-sex couples' choices with regard to procreation. *Latta*, 2014 WL 4977682, *5 (citing *Kitchen*, 755 F.3d at 1223).

These four cases from our sister circuits provide a rich mine of responses to every rationale raised by the defendants in the Sixth Circuit cases as a basis for excluding same-sex couples from contracting valid marriages. Indeed, it would seem unnecessary for this court to do more than cite those cases in affirming the district courts' decisions in the six cases now before us. Because the correct result is so obvious, one is tempted to speculate that the majority has purposefully taken the contrary position to create the circuit split regarding the legality of same-sex marriage that could prompt a grant of *certiorari* by the Supreme Court and an end to the uncertainty of status and the interstate chaos that the current discrepancy in state laws threatens. Perhaps that is the case, but it does not relieve the dissenting member of the panel from the obligation of a rejoinder.

Baker v. Nelson

If ever there was a legal "dead letter" emanating from the Supreme Court, *Baker v. Nelson*, 409 U.S. 810 (1972), is a prime candidate. It lacks only a stake through its heart. Nevertheless, the majority posits that we are bound by the Court's aging one-line order denying review of an appeal from the Minnesota Supreme Court "for want of a substantial federal question." As the majority notes, the question concerned the state's refusal to issue a marriage license to a same-sex couple, but the decision came at a point in time when sodomy was legal in only one state in the country, Illinois, which had repealed its anti-sodomy statute in 1962. The Minnesota statute criminalizing same-sex intimate relations was not struck down until

2001, almost 30 years after *Baker* was announced.[4] The Minnesota Supreme Court's denial of relief to a same-sex couple in 1971 and the United States Supreme Court's conclusion that there was no *substantial* federal question involved in the appeal thus is unsurprising. As the majority notes—not facetiously, one hopes—"that was then; this is now."

At the same time, the majority argues that we are bound by the eleven words in the order, despite the Supreme Court silence on the matter in the 42 years since it was issued. There was no recognition of *Baker* in *Romer v. Evans*, 517 U.S. 620 (1996), nor in *Lawrence v. Texas*, 539 U.S. 558 (2003), and not in *Windsor*, despite the fact that the dissenting judge in the Second Circuit's opinion in *Windsor* made the same argument that the majority makes in this case. *See Windsor v. United States*, 699 F.3d 169, 189, 192-95 (2d Cir. 2012) (Straub, J., dissenting in part and concurring in part). And although the argument was vigorously pressed by the DOMA proponents in their Supreme Court brief in *Windsor*,[5] neither Justice Kennedy in his opinion for the court nor any of the four dissenting judges in their three separate opinions mentioned *Baker*. In addition, the order was not cited in the three orders of October 6, 2014, denying *certiorari* in *Kitchen*, *Bostic*, and *Baskin*. If this string

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[4] *See Doe v. Ventura*, No. 01-489, 2001 WL 543734 (D. Ct. of Hennepin Cnty. May 15, 2001) (unreported).

[5] *See United States v. Windsor*, Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, No. 12-307, 2013 WL 267026 at 16-19, 25-26 (Jan. 22, 2013).

of cases—*Romer*, *Lawrence*, *Windsor*, *Kitchen*, *Bostic*, and *Baskin*—does not represent the Court's overruling of *Baker sub silentio*, it certainly creates the "doctrinal development" that frees the lower courts from the strictures of a summary disposition by the Supreme Court. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (internal quotation marks and citation omitted).

Definition of Marriage

The majority's "original meaning" analysis strings together a number of case citations but can tell us little about the Fourteenth Amendment, except to assure us that "the people who adopted the Fourteenth Amendment [never] understood it to require the States to change the definition of marriage." The quick answer is that they undoubtedly did not understand that it would also require school desegregation in 1955 or the end of miscegenation laws across the country, beginning in California in 1948 and culminating in the *Loving* decision in 1967. Despite a civil war, the end of slavery, and ratification of the Fourteenth Amendment in 1868, extensive litigation has been necessary to achieve even a modicum of constitutional protection from discrimination based on race, and it has occurred primarily by judicial decree, not by the democratic election process to which the majority suggests we should defer regarding discrimination based on sexual orientation.

Moreover, the majority's view of marriage as "a social institution defined by relationships between men and women" is wisely described in the plural. There is not now and never has been a universally accepted definition of marriage. In early Judeo-Christian law and throughout the West in the Middle Ages, marriage

was a religious obligation, not a civil status. Historically, it has been pursued primarily as a political or economic arrangement. Even today, polygynous marriages outnumber monogamous ones—the practice is widespread in Africa, Asia, and the Middle East, especially in countries following Islamic law, which also recognizes temporary marriages in some parts of the world. In Asia and the Middle East, many marriages are still arranged and some are even coerced.

Although some of the older statutes regarding marriage cited by the majority do speak of the union of "a man and a woman," the picture hardly ends there. When Justice Alito noted in *Windsor* that the opponents of DOMA were "implicitly ask[ing] us to endorse [a more expansive definition of marriage and] to reject the traditional view," *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting), he may have been unfamiliar with all that the "traditional view" entailed, especially for women who were subjected to coverture as a result of Anglo-American common law. Fourteenth Amendment cases decided by the Supreme Court in the years since 1971 that "invalidat[ed] various laws and policies that categorized by sex have been part of a transformation that has altered the very institution at the heart of this case, marriage." *Latta*, 2014 WL 4977682, at *20 (Berzon, J., concurring).

> Historically, marriage was a profoundly unequal institution, one that imposed distinctly different rights and obligations on men and women. The law of coverture, for example, deemed the "the husband and wife . . . one person," such that "the very being or legal existence of the woman [was]

suspended . . . or at least [was] incorporated and consolidated into that of the husband" during the marriage. 1 William Blackstone, Commentaries on the Laws of England 441 (3d rev. ed. 1884). Under the principles of coverture, "a married woman [was] incapable, without her husband's consent, of making contracts . . . binding on her or him." *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring). She could not sue or be sued without her husband's consent. *See, e.g.*, Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11–12 (2000). Married women also could not serve as the legal guardians of their children. *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality op.).

Marriage laws further dictated economically disparate roles for husband and wife. In many respects, the marital contract was primarily understood as an economic arrangement between spouses, whether or not the couple had or would have children. "Coverture expressed the legal essence of marriage as reciprocal: a husband was bound to support his wife, and in exchange she gave over her property and labor." Cott, *Public Vows,* at 54. That is why "married women traditionally were denied the legal capacity to hold or convey property . . . ." *Frontiero*, 411 U.S. at 685. Notably, husbands owed their wives support even if there were no children of the marriage. *See, e.g.*, Hendrik Hartog, *Man and Wife in America: A History* 156 (2000).

There was also a significant disparity between the rights of husbands and wives with regard to physical intimacy. At common law, "a woman was the sexual property of her husband; that is, she had a duty to have intercourse with him." John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 79 (3d ed. 2012). Quite literally, a wife was legally "the possession of her husband, . . . [her] husband's property." Hartog, *Man and Wife in America*, at 137. Accordingly, a husband could sue his wife's lover in tort for "entic[ing]" her or "alienat[ing]" her affections and thereby interfering with his property rights in her body and her labor. *Id.* A husband's possessory interest in his wife was undoubtedly also driven by the fact that, historically, marriage was the only legal site for licit sex; sex outside of marriage was almost universally criminalized. *See, e.g.*, Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L.J. 756, 763–64 (2006).

Notably, although sex was strongly presumed to be an essential part of marriage, the ability to procreate was generally not. *See, e.g.*, Chester Vernier, American Family Laws: A Comparative Study of the Family Law of the Forty-Eight American States, Alaska, the District of Columbia, and Hawaii (to Jan. 1, 1931) (1931) I § 50, 239–46 (at time of survey, grounds for annulment typically included impotency, as well as incapacity due to minority or "non-age"; lack of understanding and insanity; force or duress; fraud; disease; and incest; but not inability to

conceive); II § 68, at 38–39 (1932) (at time of survey, grounds for divorce included "impotence"; vast majority of states "generally held that impotence. . . does not mean sterility but must be of such a nature as to render complete sexual intercourse practically impossible"; and only Pennsylvania "ma[d]e sterility a cause" for divorce).

The common law also dictated that it was legally impossible for a man to rape his wife. Men could not be prosecuted for spousal rape. A husband's "incapacity" to rape his wife was justified by the theory that "'the marriage constitute[d] a blanket consent to sexual intimacy which the woman [could] revoke only by dissolving the marital relationship.'" *See, e.g.*, Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Calif. L. Rev 1373, 1376 n.9 (2000) (quoting Model Penal Code and Commentaries, § 213.1 cmt. 8(c), at 342 (Official Draft and Revised Comments 1980)).

Concomitantly, dissolving the marital partnership via divorce was exceedingly difficult. Through the mid-twentieth century, divorce could be obtained only on a limited set of grounds, if at all. At the beginning of our nation's history, several states did not permit full divorce except under the narrowest of circumstances; separation alone was the remedy, even if a woman could show "cruelty endangering life or limb." Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South* 33

> (1995); *see also id.* 32–33. In part, this policy dovetailed with the grim fact that, at English common law, and in several states through the beginning of the nineteenth century, "a husband's prerogative to chastise his wife"—that is, to beat her short of permanent injury—was recognized as his marital right. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2125 (1996).

Id. at *20-21.

Women were not the only class deprived of equal status in "traditional marriage." Until the end of the Civil War in 1865, slaves were prohibited from contracting legal marriages and often resorted to "jumping the broomstick" to mark a monogamous conjugal relationship. Informal "slave marriage" was the rule until the end of the war, when Freedmen's Bureaus began issuing marriage licenses to former slaves who could establish the existence of long-standing family relationships, despite the fact that family members were sometimes at great distances from one another. The ritual of jumping the broomstick, thought of in this country in terms of slave marriages, actually originated in England, where civil marriages were not available until enactment of the Marriage Act of 1837. Prior to that, the performance of valid marriages was the sole prerogative of the Church of England, unless the participants were Quakers or Jews. The majority's admiration for "traditional marriage" thus seems misplaced, if not naïve. The legal status has been through so many reforms that the marriage of same-sex couples constitutes merely the latest wave in a vast sea of change.

Rational-Basis Review.

The principal thrust of the majority's rational-basis analysis is basically a reiteration of the same tired argument that the proponents of same-sex-marriage bans have raised in litigation across the country: marriage is about the regulation of "procreative urges" of men and women who therefore do not need the "government's encouragement to have sex" but, instead, need encouragement to "create and maintain stable relationships within which children may flourish." The majority contends that exclusion of same-sex couples from marriage must be considered rational based on "the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended children." As previously noted, however, this argument is one that an eminent jurist has described as being "so full of holes that it cannot be taken seriously." *Baskin*, 766 F.3d at 656 (Posner, J.).

At least my colleagues are perceptive enough to acknowledge that "[g]ay couples, no less than straight couples, are capable of sharing such relationships . . . [and] are capable of raising stable families." The majority is even persuaded that the "quality of [same-sex] relationships, and the capacity to raise children within them, turns not on sexual orientation but on individual choices and individual commitment." All of which, the majority surmises, "supports the policy argument made by many that marriage laws should be extended to gay couples." But this conclusion begs the question: why reverse the judgments of four

federal district courts, in four different states, and in six different cases that would do just that?

There are apparently two answers; first, "let the people decide" and, second, "give it time." The majority posits that "just as [same-sex marriage has been adopted in] nineteen states and the District of Columbia," the change-agents in the Sixth Circuit should be "elected legislators, not life-tenured judges." Of course, this argument fails to acknowledge the impracticalities involved in amending, re-amending, or un-amending a state constitution.[6] More to the point, under our constitutional system, the courts are assigned the responsibility of determining individual rights under the Fourteenth Amendment, regardless of popular opinion or even a plebiscite. As the Supreme Court has noted, "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order [government] action violative of the Equal Protection Clause, and the [government] may not avoid

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[6] In Tennessee, for example, a proposed amendment must first be approved by a simple majority of both houses. In the succeeding legislative session, which can occur as long as a year or more later, the same proposed amendment must then be approved "by two-thirds of all the members elected to each house." Tenn. Const. art. XI, § 3. The proposed amendment is then presented "to the people at the next general election in which a Governor is to be chosen," *id.*, which can occur as long as three years or more later. If a majority of all citizens voting in the gubernatorial election also approve of the proposed amendment, it is considered ratified. The procedure for amending the constitution by convention can take equally long and is, if anything, more complicated. In Michigan, a constitutional convention, one of three methods of amendment, can be called no more often than every 16 years. *See* Mich. Const. art. XII, § 3.

the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne*, 473 U.S. at 448 (internal citation omitted).

Moreover, as it turns out, legalization of same-sex marriage in the "nineteen states and the District of Columbia" mentioned by the majority was not uniformly the result of popular vote or legislative enactment. Nine states now permit same-sex marriage because of *judicial* decisions, both state and federal: Massachusetts, Connecticut, Iowa, New Mexico, and Colorado (state supreme court decisions); New Jersey (state superior court decision not appealed by defendant); California (federal district court decision allowed to stand in ruling by United States Supreme Court); and Oregon and Pennsylvania (federal district court decisions not appealed by defendants). Despite the majority's insistence that, as life-tenured judges, we should step aside and let the voters determine the future of the state constitutional provisions at issue here, those nine federal and state courts have seen no acceptable reason to do so. In addition, another 16 states have been or soon will be added to the list, by virtue of the Supreme Court's denial of *certiorari* review in *Kitchen*, *Bostick*, and *Baskin*, and the Court's order dissolving the stay in *Latta*. The result has been the issuance of hundreds—perhaps thousands—of marriage licenses in the wake of those orders. Moreover, the 35 states that are now positioned to recognize same-sex marriage are comparable to the 34 states that permitted interracial marriage when the Supreme Court decided Loving. If the majority in this case is waiting for a tipping point, it seems to have arrived.

The second contention is that we should "wait and see" what the fallout is in the states where same-sex marriage is now legal. The majority points primarily to Massachusetts, where same-sex couples have had the benefit of marriage for "only" ten years—not enough time, the majority insists, to know what the effect on society will be. But in the absence of hard evidence that the sky has actually fallen in, the "states as laboratories of democracy" metaphor and its pitch for restraint has little or no resonance in the fast-changing scene with regard to same-sex marriage. Yet, whenever the expansion of a constitutional right is proposed, "proceed with caution" seems to be the universal mantra of the opponents. The same argument was made by the State of Virginia in *Loving*. And, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the government asked the Court to postpone applying heightened scrutiny to allegations of gender discrimination in a statute denying equal benefits to women until the Equal Rights Amendment could be ratified. If the Court had listened to the argument, we would, of course, still be waiting. One is reminded of the admonition in Martin Luther King, Jr.'s "Letter from Birmingham Jail" (1963): "For years now I have heard the word "Wait"! . . . [But h]uman progress never rolls in on wheels of inevitability . . . [and] time itself becomes an ally of the forces of social stagnation."

Animus

Finally, there is a need to address briefly the subject of unconstitutional animus, which the majority opinion equates only with actual malice and hostility on the part of members of the electorate. But in many instances involving rational-basis review, the Supreme

Court has taken a more objective approach to the classification at issue, rather than a subjective one. Under such an analysis, it is not necessary for a court to divine individual malicious intent in order to find unconstitutional animus. Instead, the Supreme Court has instructed that an exclusionary law violates the Equal Protection Clause when it is based not upon relevant facts, but instead upon only a general, ephemeral distrust of, or discomfort with, a particular group, for example, when legislation is justified by the bare desire to exclude an unpopular group from a social institution or arrangement. In *City of Cleburne*, for example, the Court struck down a zoning regulation that was justified simply by the "negative attitude" of property owners in the community toward individuals with intellectual disabilities, not necessarily by actual malice toward an unpopular minority. In doing so, the Court held that "the City may not avoid the strictures of the [Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic," 473 U.S. at 448, and cited *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), for the proposition that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." In any event, as the majority here concedes, we as a country have such a long history of prejudice based on sexual orientation that it seems hypocritical to deny the existence of unconstitutional animus in the rational-basis analysis of the cases before us.

To my mind, the soundest description of this analysis is found in Justice Stevens's separate opinion in *City of Cleburne*:

> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis."

Id. at 453 (Stevens, J., concurring) (footnotes omitted). I would apply just this analysis to the constitutional amendments and statutes at issue in these cases, confident that the result of the inquiry would be to affirm the district courts' decisions in all six cases. I therefore dissent from the majority's decision to overturn those judgments.

Today, my colleagues seem to have fallen prey to the misguided notion that the intent of the framers of the United States Constitution can be effectuated only by cleaving to the legislative will and ignoring and demonizing an independent judiciary. Of course, the framers presciently recognized that two of the three co-equal branches of government were representative in nature and necessarily would be guided by self-interest and the pull of popular opinion. To restrain those natural, human impulses, the framers crafted Article III to ensure that rights, liberties, and duties need not be held hostage by popular whims.

More than 20 years ago, when I took my oath of office to serve as a judge on the United States Court of Appeals for the Sixth Circuit, I solemnly swore to "administer justice without respect to persons," to "do

equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." *See* 28 U.S.C. § 453. If we in the judiciary do not have the authority, and indeed the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate, constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 12-CV-10285

HON. BERNARD A. FRIEDMAN

[Filed March 21, 2014]

APRIL DEBOER, individually and as parent and next friend of N.D.-R, R.D.-R., and J.D.-R, minors, and JAYNE ROWSE, individually and as parent and next friend of N.D.-R, R.D.-R., and J.D.-R, minors,

Plaintiffs,

vs.

RICHARD SNYDER, in his official capacity as Governor of the State of Michigan, and BILL SCHUETTE, in his official capacity as Michigan Attorney General,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs April DeBoer and Jayne Rowse ("plaintiffs") challenge a November 2004 voter-approved amendment to the Michigan Constitution that prohibits same-sex marriage (hereinafter the "Michigan Marriage Amendment" or "MMA"), Mich. Const. Art. I, § 25. The Michigan Marriage Amendment states: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Plaintiffs maintain that the MMA violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and they seek to enjoin state and county officials from enforcing the provision and its implementing statutes.[1]

After reviewing the evidence presented at the trial, including the testimony of various expert witnesses, the exhibits, and stipulations, and after considering all of the legal issues involved, the Court concludes that the MMA is unconstitutional and will enjoin its enforcement.

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[1] The defendants in this matter are Michigan Governor Richard Snyder and Attorney General Bill Schuette (collectively the "state defendants"). Plaintiffs later added former Oakland County Clerk, Bill Bullard, Jr. as a party defendant, who was eventually replaced by his successor in office, defendant Lisa Brown. Although Brown is named as a defendant in this matter, she has adopted plaintiffs' legal position challenging the MMA.

I. Background

The underlying facts of this case are straightforward. Plaintiffs are an unmarried same-sex couple residing in Hazel Park, Michigan. They have lived together for the past eight years and jointly own their residence. Both are state-licensed foster parents. DeBoer is a nurse in the neonatal intensive care unit at Hutzel Hospital and Rowse is an emergency room nurse at Henry Ford Hospital, both located in Detroit. In November 2009, Rowse, as a single person, legally adopted child N. In October 2011, also as a single person, she legally adopted child J. In April 2011, DeBoer, as a single person, adopted child R. Unable to jointly adopt the three children, plaintiffs initially filed the instant action against the state defendants requesting that the Court enjoin them from enforcing section 24 of the Michigan Adoption Code (hereinafter "section 24"), Mich. Comp. Laws § 710.24, which restricts adoptions to either single persons or married couples. Plaintiffs claimed that section 24 violates the Equal Protection Clause because it impermissibly discriminates against unmarried couples. In response, the state defendants moved to dismiss the complaint on the grounds that, among other things, plaintiffs lacked standing to bring suit.

The Court held a hearing on the state defendants' motion and expressed reservations that plaintiffs did not possess the requisite standing to challenge section 24. The Court noted that while plaintiffs made a colorable claim that they and their children were, in fact, injured by their ineligibility to petition for joint adoption, this injury was not traceable to defendants' enforcement of section 24. Rather, plaintiffs could not

jointly adopt their children because they were not married, and any legal form of same-sex union is prohibited by the MMA. The Court concluded the hearing by inviting plaintiffs to seek leave to amend their complaint to include a challenge to the MMA.

Plaintiffs accepted the Court's invitation and sought leave to amend their complaint, which the Court granted over defendants' objection. The amended complaint included a second cause of action challenging the validity of the MMA on both due process and equal protection grounds. The state defendants then renewed their motion, this time to dismiss the amended complaint. The Court held the matter in abeyance and then denied the motion after the United States Supreme Court issued its decision in United States v. Windsor, 133 S. Ct. 2675 (2013), invalidating section 3 of the Defense of Marriage Act of 1996 ("DOMA").

Thereafter, the parties both filed motions for summary judgment. The state defendants, in support of their argument that the MMA has legitimate purposes, offered the following reasons for excluding same-sex couples from Michigan's definition of marriage: (1) providing children with "biologically connected" role models of both genders that are necessary to foster healthy psychological development; (2) avoiding the unintended consequences that might result from redefining marriage; (3) upholding tradition and morality; and (4) promoting the transition of "naturally procreative relationships into stable unions." Assuming that the appropriate level of scrutiny in this case is rational basis review, the Court concluded that plaintiffs raised triable issues of fact regarding whether the proffered rationales for the MMA serve a

legitimate state interest, but that plaintiffs had not demonstrated their entitlement to summary judgment. As a result, the Court scheduled the matter for trial.

II. Trial Proceedings, Summary of Testimony, and Findings of Fact

In setting the case for trial, the Court directed the parties to address a narrow legal issue: whether the MMA survives rational basis review. In other words, does the MMA proscribe conduct in a manner that is rationally related to any conceivable legitimate governmental purpose.

Plaintiffs called psychologist David Brodzinsky as their first witness. He testified that decades of social science research studies indicate that there is no discernible difference in parenting competence between lesbian and gay adults and their heterosexual counterparts. Pls.' Ex. 30 at 3-4. Nor is there any discernible difference in the developmental outcomes of children raised by same-sex parents as compared to those children raised by heterosexual parents. Id. Brodzinsky stressed that the primary factors influencing childhood development are:

> [the] quality of parent-child relationships; quality of the relationships between the parents . . . [t]he characteristics of the parent, the styles that they adopt, parental warmth and nurturance [sic], emotional sensitivity. The ability to employ age appropriate rules and structure for the child. And the kinds of educational opportunities that children are afforded is important, as well as the resources that are provided for the child, not only in the

> family itself, but the resources that, from the outside, that impact the family and the child in particular. And of course, the mental health of . . . the parents.

Brodzinsky, Tr. 2/25/14 pp. 69-70. Contrary to the state defendants' position, Brodzinsky testified that there is no body of research supporting the belief that children require parent role models of both genders to be healthy and well adjusted. Id. at 78-79. What matters is the "quality of parenting that's being offered" to the child. Id. at 78. Brodzinsky also noted that same-sex parenting has become a fact of life for many American children and that legally recognizing same-sex marriages would benefit these children by promoting family stability and investing these families with "social capital." Id. at 136.

Brodzinsky also addressed the criticism that most of the social science research studies informing his conclusions are statistically unreliable because they utilized small and self-selecting sample populations, i.e., "convenience studies." In addressing this criticism, Brodzinsky indicated that researchers in the fields of child development and family psychology commonly use convenience studies as a methodological tool for studying issues of interest because they, in contrast to large-scale studies, offer the opportunity for a more detailed analysis of the circumstances affecting children and their parents. While Brodzinsky acknowledged that small-scale convenience samples have their limitations, he highlighted that researchers studying same-sex households have verified the conclusions of their convenience studies by consistently replicating the results of these studies using different

research strategies and sample populations. These studies, approximately 150 in number, have repeatedly demonstrated that there is no scientific basis to conclude that children raised by same-sex parents fare worse than those raised by heterosexual parents.

The Court finds Brodzinsky's testimony to be fully credible and gives it considerable weight. He testified convincingly that children's outcomes depend on the factors he cited, and not on their parents' gender and not on whether they are raised by heterosexual or same-sex couples. The quality of a person's child-rearing skills is unrelated to the person's gender or sexual orientation. Brodzinsky's credibility was not in any way lessened by the fact that the social science research upon which his opinions are based come largely from so-called "convenience studies." As Brodzinsky and others testified, such studies are the "bread and butter" of many areas of social science research, and the results of such studies are valid and reliable if, as occurred here, they are consistently replicated by different researchers studying different sample groups.

Sociologist Michael Rosenfeld supported this conclusion. In his 2010 study entitled "Nontraditional Families and Childhood Progress Through School," Rosenfeld gathered data from the 2000 United States Census to examine whether grade school children of same-sex couples progress through school at the same rate as children raised by heterosexual couples. Controlling for parental income, education levels and family stability, Rosenfeld found that children raised by same-sex couples progress through school at almost the same rate as children raised by heterosexual

married couples. Regarding couple stability, Rosenfeld testified that cohabiting same-sex couples reported higher break-up rates than heterosexual married couples during the years preceding any legally recognized form of same-sex union (in the 1980s and 1990s). However, studies measuring couple stability during the era of legally recognized same-sex unions demonstrated that longevity rates among cohabiting same-sex couples was on par with heterosexual married couples. Referring to his ongoing longitudinal study[2] entitled "How Couples Meet and Stay Together," Rosenfeld confirmed that same-sex couples in legally recognized unions exhibit the same couple stability rates as their heterosexual married counterparts.

Although he testified that the social science community has formed a strong consensus regarding the comparable outcomes of children raised by same-sex couples, Rosenfeld recognized that a small number of detractors have criticized his research. In particular, Rosenfeld referred to a 2013 study conducted by family economists Douglas Allen, Catherine Pakaluk and Joseph Price that critiqued the statistical methodology he used in his 2010 study. Allen, Palaluk and Price contended that Rosenfeld's results were inaccurate because he excluded children from his sample population who should have been included. Rosenfeld responded to this argument at trial by showing that Allen, Pakaluk and Price had overstated the statistical uncertainty of his results. Through demonstrative exhibits, Rosenfeld showed that the results of his study were not inaccurate at all.

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[2] A longitudinal study is one that measures specific indicators over the course of time.

After controlling for parental education and income levels, Rosenfeld's data indicated that the children of heterosexual married couples are just as likely to be held back in school as are the children of same-sex couples. This finding led him to conclude that in terms of school progress "there is no significant difference between the children of same-sex couples and the children of heterosexual married couples."[3] Rosenfeld, Tr. 2/25/14 p. 82.

The Court finds Rosenfeld's testimony to be highly credible and gives it great weight. His research convincingly shows that children of same-sex couples do just as well in school as the children of heterosexual married couples, and that same-sex couples are just as stable as heterosexual couples. The Court notes that the testimony of Brodzinsky and Rosenfeld is in line with a strong "no differences" consensus within the professional associations in the psychological and sociological fields. Brodzinsky made the following statement in his expert witness report, which defendants did not challenge:

> Every major professional organization in this country whose focus is the health and well-being of children and families has reviewed the data on outcomes for children raised by lesbian and gay couples, including the methods by which the data were collected, and have concluded that these children are not disadvantaged compared

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[3] Rosenfeld's study showed that children raised by heterosexual married couples are less than one percent less likely to be held back in school than children raised by same-sex couples. According to Rosenfeld, this minuscule difference is statistically insignificant.

> to children raised in heterosexual parent households. Organizations expressing support for parenting, adoption, and/or fostering by lesbian and gay couples include (but are not limited to): American Medical Association, American Academy of Pediatrics, American Psychiatric Association, American Academy of Child and Adolescent Psychiatry, American Psychoanalytic Association, American Psychological Association, Child Welfare League of America, National Association of Social Workers, and the Donaldson Adoption Institute.

Pls.' Ex. 30 at ¶ 21. In fact, the 2004 Council of Representatives of the American Psychological Association ("APA") unanimously voted in favor of issuing a position statement that "research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish." Pls.' Ex. 111 at 2.

Law professor Vivek Sankaran testified that the MMA destabilizes children raised by same-sex couples in the event the sole legal parent dies or becomes incapacitated. Sankaran stated that in such circumstances the "non-legal" parent could petition for guardianship over the child, but that these proceedings are burdensome and often lack finality because Michigan courts are required to review a non-legal parent's guardianship status every year until the child turns 18. Moreover, once the non-legal parent commences a guardianship proceeding there is no guarantee that the court will either award

guardianship to that parent or eventually permit him or her to adopt the child. Michigan law allows any individual possessing an interest in the child's welfare to file a petition removing the guardian if the removal would serve the child's best interests. Sankaran testified that an interested person may include a distant relative of the child, a neighbor, teacher, or "anyone who claims to have an interest in the child."

Should the non-legal parent encounter any delay in pursuing the guardianship, there is also the prospect that the Michigan Department of Human Services ("DHS") could initiate a child neglect investigation because the child would be left for at least some period of time without a legal guardian. Sankaran, Tr. 2/26/14 pp. 120-121. In this event, DHS is authorized to file a petition in juvenile court to remove the child from the custody of the non-legal parent and place the child in foster care. At the removal proceeding, the non-legal parent would not be a party to the proceeding nor would the juvenile court appoint a lawyer to represent the non-legal parent's interests. According to Sankaran, the non-legal parent would have to become a licensed foster parent in order to obtain custody of the child, and even then the juvenile court is not required to place the child with the non-legal parent. These destabilizing consequences could have far reaching effects throughout the state, as demographer Gary Gates testified that currently there are approximately 14,598 same-sex couples living in Michigan and that approximately 2,650 such couples are raising 5,300 children. Gates, Tr. 2/27/14 p. 29.

The Court finds Sankaran's testimony to be fully credible and gives it great weight. He testified

convincingly that children being raised by same-sex couples have only one legal parent and are at risk of being placed in "legal limbo" if that parent dies or is incapacitated. Denying same-sex couples the ability to marry therefore has a manifestly harmful and destabilizing effect on such couples' children. The testimony of Gates, whom the Court also found to be a highly credible witness, showed the magnitude of this effect by noting that 5,300 children in Michigan are currently being raised by same-sex couples.

Plaintiffs also presented expert testimony that the MMA erodes the benefits that marriage has historically promoted. Historian Nancy Cott testified that, from the founding of the colonies through the early years of the republic, civil authorities regulated marriage to foster stable households, legitimate children and designate providers to care for dependents who otherwise would become wards of the state. During the twentieth century, the state and federal governments furthered these goals by granting many benefits to married couples. For instance, Social Security survivor benefits and government sponsored healthcare benefits are available to legally married couples, but not unmarried partners. Yet, by effectively foreclosing same-sex couples from obtaining these benefits, the MMA undermines the very aim of one of the central historical bases for civil marriage, namely, family stability.

Cott further attested that there is no historical precedent for prohibiting marriages that are incapable of creating biological offspring. After surveying the domestic legal history of every state in the country, Cott indicated that none of them have ever required a couple to possess the capacity or inclination to

procreate as a prerequisite to marriage. Cott, Tr. 2/28/14 p. 14. She highlighted that sterility or infertility have never constituted legal grounds for the annulment of a marriage. Nor have states prohibited post-menopausal women or sterile men from marrying. Examining the historical grounds for divorce, Cott noted that the "inability to have a child has not been a ground of divorce in any state, including Michigan." Id. at 15. The Court finds Cott to be highly credible and accords her testimony great weight.

Even today, the State of Michigan does not make fertility or the desire to have children a prerequisite for obtaining a marriage license. As defendant Lisa Brown testified, Michigan county clerks are not authorized to consider a couple's stability, criminal record, ability to procreate, parenting skills, or the potential future outcomes of their children before issuing a marriage license. Brown, Tr. 3/3/14 pp. 34, 38-40. County clerks may only evaluate the age and residency of the license applicants and whether either of the applicants is currently married.[4] Id. at 32, 35.

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[4] Under Michigan law, the statutory requirements applicable to those wishing to marry are minimal. Applicants must (1) be of the opposite sex; (2) consent to be married; (3) not be directly related to one another; (4) not already be married to another person; (5) be at least 18 years old (or at least 16 years old with the consent of a parent or guardian); and (6) pay $20 for a license from the clerk of the county where either party resides or where the marriage will be performed. See Mich. Comp. Laws §§ 551.1, 551.2, 551.3, 551.4, 551.5, 551.101, 551.103. Once a license is issued, the marriage must be solemnized before two witnesses and a person with statutory authority. See Mich. Comp. Laws §§ 551.7, 551.9.

The Court finds Brown to be highly credible and gives her testimony great weight. She testified convincingly that county clerks in Michigan must issue a marriage license to any couple who meet the sparse statutory requirements concerning age, residency, and single status. Clerks do not inquire about whether applicants intend to raise children, whether they possess good parenting skills, or whether they have a criminal record.

In defense of their asserted justifications for the MMA, the state defendants first called sociologist Mark Regnerus. Regnerus's testimony focused on the results of his 2012 "New Family Structures Study" ("NFSS"), a survey data collection project that was formulated to assess adult outcomes of children who reported that one of their parents had been in a "romantic relationship with someone of the same-sex" during the respondents' childhood years. Of the 15,000 participants ranging in age from 18 to 39, 248 of them reported that one of their parents had been in such a romantic relationship. From this sample, 175 reported that their mother had a same-sex romantic relationship while 73 reported that their father had been romantically involved with another man. Regnerus then compared the adult outcomes of these two sub-groups with another set of participants who were raised by intact biological parents. The outcomes of these groups were significantly different.

Regnerus found that children who reported that their mothers had a same-sex relationship were less likely to pursue an education or obtain full-time employment and more likely to be unemployed and receiving public assistance, more likely to experience

sexual assault, more likely to cheat on their partners or spouses and more likely to have been arrested at some point in their past. Similarly, Regnerus discovered that children who reported that their fathers had a same-sex relationship were more likely to have been arrested, more likely to plead guilty to non-minor offenses and more likely to have numerous sexual partners.

Although Regnerus touted the NFSS as one of the few studies to use a large representative pool of participants drawn from a random population-based sample, other sociological and demographic experts, including Rosenfeld and Gates, heavily criticized the study on several grounds. First, it failed to measure the adult outcomes of children who were actually raised in same-sex households. This is because the participants' household histories revealed that many parental same-sex romantic relationships lasted for only brief periods of time. And many of the participants never lived in a same-sex household at all. Regnerus reported that "just over half (90) of the 175 respondents whose mother had a lesbian relationship reported that they did not live with both their mother and her same-sex partner at the same time." Id. at 11. Second, many critics voiced their concern that the NFSS made an unfair comparison between children raised by parents who happened to engage in some form of same-sex relationship and those raised by intact biological families. This is because almost all of the children in the former group were the offspring of a failed prior heterosexual union, which produced a significant measure of household instability and parental relationship fluctuation.

Even Regnerus recognized the limitations of the NFSS. In his expert report, Regnerus acknowledged that "any suboptimal outcomes may not be due to the sexual orientation of the parent" and that "[t]he exact source of group differences" are unknown. Defs.' Ex. 28 at 5. Moreover, of the only two participants who reported living with their mother and her same-sex partner for their entire childhood, Regnerus found each of them to be "comparatively well-adjusted on most developmental and contemporary outcomes." Id. at 11. Nonetheless, Regnerus testified that there is no conclusive evidence that "growing up in households wherein parents are in (or have been in) same-sex relationships" does not adversely affect child outcomes. Id. at 16.

The Court finds Regnerus's testimony entirely unbelievable and not worthy of serious consideration. The evidence adduced at trial demonstrated that his 2012 "study" was hastily concocted at the behest of a third-party funder, which found it "essential that the necessary data be gathered to settle the question in the forum of public debate about what kinds of family arrangement are best for society" and which "was confident that the traditional understanding of marriage will be vindicated by this study." See Pls.' Motion in limine to Exclude Testimony of Mark Regnerus, Ex. 9. In the funder's view, "the future of the institution of marriage at this moment is very uncertain" and "proper research" was needed to counter the many studies showing no differences in child outcomes. Id. The funder also stated that "this is a project where time is of the essence." Id. Time was of the essence at the time of the funder's comments in April 2011, and when Dr. Regnerus published the

NFSS in 2012, because decisions such as Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), and Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), were threatening the funder's concept of "the institution of marriage."

While Regnerus maintained that the funding source did not affect his impartiality as a researcher, the Court finds this testimony unbelievable. The funder clearly wanted a certain result, and Regnerus obliged. Additionally, the NFSS is flawed on its face, as it purported to study "a large, random sample of American young adults (ages 18-39) who were raised in different types of family arrangements" (emphasis added), but in fact it did not study this at all, as Regnerus equated being raised by a same-sex couple with having ever lived with a parent who had a "romantic relationship with someone of the same sex" for any length of time. Whatever Regnerus may have found in this "study," he certainly cannot purport to have undertaken a scholarly research effort to compare the outcomes of children raised by same-sex couples with those of children raised by heterosexual couples. It is no wonder that the NFSS has been widely and severely criticized by other scholars, and that Regnerus's own sociology department at the University of Texas has distanced itself from the NFSS in particular and Dr. Regnerus's views in general and reaffirmed the aforementioned APA position statement.

In reviewing the many research studies that have measured the outcomes of children raised by same-sex couples, family studies professor Loren Marks and economist Joseph Price questioned the validity of these studies in view of their statistical methodologies. Both

witnesses testified that the research studies of same-sex families often have relied upon small self-selecting sample sizes, rarely compared child outcomes to children raised by intact heterosexual couples, and failed to use "hard" outcome variables that are easily to measured, i.e., grade retention, criminality or unemployment.

In his testimony, Marks lauded a 1996 study performed by Australian researcher Sotirios Sarantakos entitled "Children in Three Contexts: Family, Education and Social Development." That study compared 58 children of heterosexual married parents, 58 children of heterosexual cohabiting couples, and 58 children living with same-sex couples across a wide spectrum of teacher-reported scholastic measures. Defs.' Ex. 25 at 16, 38. Marks testified that after controlling for, among other things, parental income and education levels, the study found significant differences between children raised by intact heterosexual married parents and those raised by same-sex parents. Sarantakos concluded, "children of married [heterosexual] couples are more likely to do well at school in academic and social terms, than children of cohabiting and homosexual couples." Id. at 17. However, on cross-examination, Marks conceded that the study's probative value was limited by the fact that most of the 58 children raised by same-sex couples experienced parental divorce at some earlier time in their lives. Marks, Tr. 3/5/14 pp. 75-76. By comparison, none of the children raised by heterosexual married parents experienced parental separation. Id. at 76. At several points in the study, even Sarantakos acknowledged that this discrepancy in family stability

could have accounted for the differing levels of achievement between these groups. Id. at 76-78.

Price cited to his 2012 article, authored with Douglas Allen and Catherine Pakaluk, in evaluating the statistical methodology that Rosenfeld used in his 2010 study. Price opined that the Rosenfeld study was flawed because the results were statistically uncertain and the sample population was too small to observe statistically significant differences between children raised by same-sex couples and those raised by heterosexual couples. Price also stated that Rosenfeld's study was problematic because it controlled for family stability by "restricting an analysis of family structure to families that have [not] experience[d] changes for the previous five years," which "eliminates one of the important channels through which the effect of family structure is likely to operate." Defs.' Ex. 27 at ¶ 28. By expanding Rosenfeld's sample population and controlling for certain factors such as family stability, Price's study found that children raised by same-sex couples have noticeably worse outcomes than children raised by heterosexual couples. Ultimately, both Marks and Price concluded that current social science research has not definitively demonstrated that there is no difference between children raised by same-sex couples and those children raised by their heterosexual counterparts. Marks, Tr. 3/5/14 p. 24; Price, Tr. 3/5/14 pp. 54-56.

Economist Douglas Allen testified about his own study using data from the 2006 Canadian Census, which compared the high school graduation rates of young adults (ages 17-22) raised by heterosexual married couples and those raised by same-sex couples.

Without controlling for any particular factors, Allen found that 72 percent of children raised in heterosexual married households graduated from high school as opposed to 60 percent of those raised in gay parent homes and 52 percent for those raised in lesbian homes. Defs.' Ex. 26 at ¶ 36. On cross-examination, Allen conceded that many of the young adults who were living in same-sex households in 2006 had previously lived in heterosexual households where their parents had either divorced or separated. Id. at ¶ 49; Allen, Tr. 3/6/14 pp. 119-120. Similarly, because the study relied on a "snap shot" of the sample population during the 2006 Canadian Census, Allen could not gauge how the young adult subjects progressed through school during their childhood years or when their academic progress began to decline. Allen, Tr. 3/6/14 p. 120. One of the major limitations of Allen's study was that he could not discern whether a particular young adult's academic decline coincided with a separation in the household. Id. at 120-121. This led Allen to acknowledge in a footnote that his "paper does not study the effect of growing up in a same-sex household, but rather examines the association of school performance for those children who lived with same-sex parents in 2006." Defs.' Ex. 15 at 4 (emphasis added). Moreover, when Allen controlled for parental education, marital status and five years of residential stability, he discovered that there was no statistically significant difference in graduation rates. Allen, Tr. 3/6/14 pp/ 128-129.

The Court was unable to accord the testimony of Marks, Price, and Allen any significant weight. Marks's testimony is largely unbelievable. He characterized the overwhelming consensus among sociologists and

psychologists who endorse the "no differences" viewpoint as "group think," by which he said he meant a politically correct viewpoint that the majority has accepted without subjecting it to proper scientific scrutiny. Marks undertook an excruciatingly detailed examination of the 59 published studies cited by the APA in support of its 2005 "Brief on Lesbian and Gay Parenting," in which it concluded that "[n]ot a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents." Marks, as well as Price and Allen, faulted many of these studies for their small sample sizes, the non-random methods used to obtain subjects, and the fact that some lacked heterosexual comparison groups, among other criticisms. Marks, Price and Allen all failed to concede the importance of "convenience sampling" as a social science research tool. They, along with Regnerus, clearly represent a fringe viewpoint that is rejected by the vast majority of their colleagues across a variety of social science fields. The most that can be said of these witnesses' testimony is that the "no differences" consensus has not been proven with scientific certainty, not that there is any credible evidence showing that children raised by same-sex couples fare worse than those raised by heterosexual couples.

III. Conclusions of Law

A. Legal Standards

The Court finds that the MMA impermissibly discriminates against same-sex couples in violation of the Equal Protection Clause because the provision does not advance any conceivable legitimate state interest. In light of this determination, the Court finds it

unnecessary to address whether the MMA burdens the exercise of a fundamental right under the Due Process Clause.[5] See Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.")

The Equal Protection Clause forbids a state from denying "to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, and promotes the ideal that "all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). On the other hand, states are empowered to "perform many of the vital functions of modern government," Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012), which necessarily involves adopting regulations which distinguish between certain groups within society. See Romer v. Evans, 517 U.S. 620, 631 (1996). A balance must therefore be struck between equal protection principles and the practicalities of governance.

To this end, the United States Supreme Court has fashioned a three-tiered framework for evaluating

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[5] The Court notes, however, that the Supreme Court has repeatedly recognized marriage as a fundamental right. See Turner v. Safley, 482 U.S. 78, 95 (1987) (stating that "the decision to marry is a fundamental right"); Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639-640 (1974) (stating that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment)." Loving v. Virginia, 388 U.S. 1, 12 (1967) (same); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (same).

whether a provision of law offends the Equal Protection Clause. The most rigorous tier is "strict" scrutiny, which is reserved for laws that discriminate against "suspect classes" such as racial, ethnic or religious minorities. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny to racial classification); Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying strict scrutiny to classification based upon national origin). A more relaxed form of inquiry is "intermediate" or "heightened" scrutiny, which courts have applied to laws that discriminate against groups on the basis of gender, alienage or illegitimacy, also known as "quasi-suspect classes." See Clark v. Jeter, 486 U.S. 456, 461 (1988) (applying intermediate scrutiny to classification based upon illegitimacy); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723-724 (1982) (applying intermediate scrutiny to gender classification). The least exacting tier is "rational basis" review, which assesses the propriety of legislation that does not implicate either suspect or quasi-suspect classes.

In this case, plaintiffs moved to bifurcate the trial in the event the Court decided to hear testimony about whether classifications based on sexual orientation are deserving of heightened scrutiny. The Court granted the motion, although governing Sixth Circuit precedent does not consider gay, lesbian, bisexual or transgender persons to constitute suspect or quasi-suspect classes. See Davis v. Prison Health Servs., 679 F.3d 433, 438 (6th Cir. 2012); Scarborough v. Morgan County Bd. of Educ., 470 F.3d 250, 261 (6th Cir. 2006). While some federal courts have held that a more exacting level of scrutiny should be applied in reviewing the constitutionality of same-sex marriage bans, see

Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012); Massachusetts v. United States Dep't of Health and Human Servs., 682 F.3d 1, 11 (1st Cir. 2012), the Court need not decide the issue because the MMA does not survive even the most deferential level of scrutiny, i.e., rational basis review.

Under this standard, the Court must determine whether the MMA proscribes conduct in a manner that is rationally related to the achievement of a legitimate governmental purpose. See Vance v. Bradley, 440 U.S. 93, 97 (1979); Guzman v. United States Dep't of Homeland Sec., 679 F.3d 425, 432 (6th Cir. 2012). Courts will not invalidate a provision of law on equal protection grounds "unless [its] varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a reviewing court] can only conclude that the government's actions were irrational." Kimel v. Florida Bd. of Regents, 528 U.S. 62, 84 (2000). "The government [also] has no obligation to produce evidence to support the rationality of its . . . [imposed] classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data." Hadix v. Johnson, 230 F.3d 840, 843 (6th Cir. 2000). Rather, it is incumbent upon plaintiffs to refute "any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

B. Asserted Reasons for the MMA

Largely in keeping with the justifications offered in their summary judgment motion, at trial, the state defendants asserted that the MMA serves the following legitimate state interests: (1) providing an optimal

environment for child rearing; (2) proceeding with caution before altering the traditional definition of marriage; and (3) upholding tradition and morality. Additionally, the state defendants consistently asserted that defining marriage is within the exclusive purview of the state's police power. None of these proffered reasons provides a rational basis for adopting the amendment.

1. Optimal Environment

The state defendants argued that the citizens of Michigan adopted the MMA on the premise that heterosexual married couples provide the optimal environment for raising children. The Court rejects this rationale for several reasons.

First, the evidence adduced at trial disproved this premise. Rosenfeld's study shows that children raised by same-sex couples progress at almost the same rate through school as children raised by heterosexual married couples. In fact, the difference between the two groups is nearly immeasurable. Brodzinsky similarly testified that approximately 150 sociological and psychological studies of children raised by same-sex couples have repeatedly confirmed Rosenfeld's findings that there is simply no scientific basis to conclude that children raised in same-sex households fare worse than those raised in heterosexual households. Brodzinsky also testified that parental gender plays a limited role, if any, in producing well-adjusted children. Brodzinsky, Tr. 2/25/14 p. 78. He stated that:

> It's not the gender of the parent that's the key. It's the quality of parenting that's being offered by whoever is there, husband or wife, two

> women, two men, a single parent, as long as the factors that we listed . . . are present: good mental health, good parent-child relationships, what we call an authoritative parenting style, which is warmth, stimulation, structure, and the availability of resources. Then we're going to have a child who is much more likely to be healthy.

Id. at 78-79.

In response, state defendants cited a small number of outlier studies in support of the optimal child-rearing rationale. In an effort to show that children raised by same-sex couples fare worse than those raised by heterosexual couples, the state defendants relied principally upon Regnerus's NFSS study and Allen's 2006 Canadian Census study, but these efforts were unavailing. The common flaw of the Regnerus and Allen studies was the failure to account for the fact that many of the subjects who were raised in same-sex households experienced prior incidents of family instability (e.g., divorce or separation) or were initially placed in the foster care system. Both researchers acknowledged that poor school performance could result from a child's exposure to divorce or parental separation. Regnerus's NFSS study also suffered from another defect in that it failed to measure the adult outcomes of children who were actually raised in same-sex households. In short, the isolated studies cited by the state defendants do not support the argument that children raised by heterosexual couples have better outcomes than children raised by same-sex couples. To the contrary,

the overwhelming weight of the scientific evidence supports the "no differences" viewpoint.

Second, the optimal child-rearing justification for the MMA is belied by the state's own marriage requirements. The prerequisites for obtaining a marriage license under Michigan law do not include the ability to have children, a requirement to raise them in any particular family structure, or the prospect of achieving certain "outcomes" for children. By the same token, the state does not allow for the annulment of a marriage once a couple discovers it cannot conceive, or if the family structure changes, or if the couple's children do poorly in school.

Third, contrary to the state defendants' contentions, the MMA actually fosters the potential for childhood destabilization. For instance, in this particular case should either of the plaintiffs die or become incapacitated, the surviving non-legal parent would have no authority under Michigan law to make legal decisions on behalf of the surviving children without resorting to a prolonged and complicated guardianship proceeding. And in the event that a state court were to award guardianship of the surviving children to the non-legal parent, the guardianship would have to be renewed annually and would remain susceptible to the challenge of an interested party at any time. This, as Brodzinsky testified, places such children in a legally precarious situation and deprives them of "social capital."

Fourth, the state defendants' position suffers from a glaring inconsistency. Even assuming that children raised by same-sex couples fare worse than children raised by heterosexual married couples, the state

defendants fail to explain why Michigan law does not similarly exclude certain classes of heterosexual couples from marrying whose children persistently have had "sub-optimal" developmental outcomes. According to Rosenfeld's study, children raised by suburban residents academically outperformed those children raised by rural and urban residents. Likewise, "middle class and poor families are 'sub-optimal' compared to well-off families, and couples with less formal education are "sub-optimal" compared to couples with more formal education." Pls.' Ex. 31 at 5. A child's racial background is another predictive indicator of future success, as the study showed that "the probability of making good progress through school is greater in the U.S. for children of Asian descent than for children of all other racial groups." Id. Taking the state defendants' position to its logical conclusion, the empirical evidence at hand should require that only rich, educated, suburban-dwelling, married Asians may marry, to the exclusion of all other heterosexual couples. Obviously the state has not adopted this policy and with good reason. The absurdity of such a requirement is self-evident. Optimal academic outcomes for children cannot logically dictate which groups may marry.

Finally, the Court rejects the "optimal environment" justification because that goal is simply not advanced by prohibiting same-sex couples from marrying. As Gates testified, there are thousands of same-sex couples currently raising thousands of children in Michigan, and these numbers have steadily increased over the past 20 years. Prohibiting gays and lesbians from marrying does not stop them from forming families and raising children. Nor does prohibiting

same-sex marriage increase the number of heterosexual marriages or the number of children raised by heterosexual parents. There is, in short, no logical connection between banning same-sex marriage and providing children with an "optimal environment" or achieving "optimal outcomes."

2. Proceeding With Caution

Throughout the trial, the state defendants asserted that Michigan has a legitimate interest in proceeding with caution before altering the traditional definition of marriage. The state defendants' experts all concluded that it is too soon to understand the societal impact of allowing same-sex couples to marry because further study is required. This "wait-and-see" justification is not persuasive.

Legislatures and regulatory agencies often cite to such reasoning when postponing decisions related to issues of public importance, as matters of public policy are resolved with more candor and insight when they are decided after an open debate based on sufficient facts. This is why federal administrative agencies must provide the public with a notice and comment period before exercising their rule-making authority. Hearings must be held, studies must be conducted, and legislators must deliberate. These things necessarily take time. But the calculus is fundamentally altered when constitutional rights are implicated because "any deprivation of constitutional rights calls for prompt rectification." Watson v. Memphis, 373 U.S. 526, 532-533 (1963). "The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." Id. The state may not

shield itself with the "wait-and-see" approach and sit idly while social science research takes its plodding and deliberative course. Were the Court to accept this position, "it would turn the rational basis analysis into a toothless and perfunctory review" because "the state can plead an interest in proceeding with caution in almost any setting." Kitchen v. Herbert, No. 13-217, 2013 U.S. Dist. LEXIS 179331, at *77 (D. Utah Dec. 20, 2013). Rather, the state must have some rationale beyond merely asserting that there is no conclusive evidence to decide an issue one way or another. See Perry, 704 F. Supp. 2d at 972 (quoting Romer for the proposition that "[e]ven under the most deferential standard of review . . . the court must 'insist on knowing the relation between the classification adopted and the object to be attained.'"). Since the "wait-and-see" approach fails to meet this most basic threshold it cannot pass the rational basis test.

3. Tradition and Morality

Implicit in the "wait-and-see" approach is the state defendants' underlying contention that preserving traditional marriage is a legitimate goal in and of itself. The difficulty with this justification is two-fold. First, the Supreme Court has held that tradition alone does not satisfy rational basis review. See Heller v. Doe, 509 U.S. 312, 326 (1993) (stating that the "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."). Second, traditional notions of marriage are often enmeshed with the moral disapproval of redefining marriage to encompass same-sex relationships. On this point, many federal courts have noted that moral disapproval is not a sufficient rationale for upholding a provision of law on

equal protection grounds. See Massachusetts v. U.S. Dept. of Health and Human Servs., 682 F.3d 1, 15 (1st Cir. 2012) (invalidating section 3 of the Defense of Marriage Act because the statute expressed a moral disapproval of homosexuality); De Leon v. Perry, No. 13-0982, 2014 U.S. Dist. LEXIS 26236, at *48-49 (W.D. Tex. Feb. 26, 2014) (rejecting morality as a justification); Bishop v. United States, No. 04-848, 2014 U.S. Dist. LEXIS 4374, at *101 (N.D. Okla. Jan. 14, 2014) (stating that "upholding one particular moral definition of marriage . . . is not a permissible justification."); Kitchen, 2013 U.S. Dist. LEXIS 179331, at *79 (same).

In delivering their opening and closing remarks, plaintiffs' attorneys contended that the voters who approved the MMA were motivated by animus towards lesbian, gay, bisexual and transgender individuals. Since the Court is unable discern the intentions of each individual voter who cast their ballot in favor of the measure, it is cannot ascribe such motivations to the approximately 2.7 million voters who approved the measure. Many Michigan residents have religious convictions whose principles govern the conduct of their daily lives and inform their own viewpoints about marriage. Nonetheless, these views cannot strip other citizens of the guarantees of equal protection under the law. The same Constitution that protects the free exercise of one's faith in deciding whether to solemnize certain marriages rather than others, is the same Constitution that prevents the state from either mandating adherence to an established religion, U.S. Const. amend I, or "enforcing private moral or religious beliefs without an accompanying secular purpose." Perry, 704 F. Supp. 2d at 930-931 (citing Lawrence v.

Texas, 539 U.S. 558, 571 (2003)). As a result, tradition and morality are not rational bases for the MMA.

4. Federalism

Citing to the Supreme Court's decision in Windsor, the state defendants maintain that the authority to define marriage falls within the exclusive and inherent powers of the state.[6] In finding section 3 of DOMA

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[6] Forty years before the Supreme Court decided Windsor, the Minnesota Supreme Court held in Baker v. Nelson, 291 Minn. 310 (1971), that same-sex couples have no Fourteenth Amendment right to marry. The following year, in a single sentence, the United States Supreme Court dismissed the appeal "for want of a substantial federal question." Baker v. Nelson, 409 U.S. 810 (1972). The state defendants have argued in the present case that Baker is binding precedent.

The answer to this argument was ably articulated by Judge Shelby in Kitchen, 2013 U.S. Dist. LEXIS 179331, at *23-26:

> [T]he Supreme Court has stated that a summary dismissal is not binding "when doctrinal developments indicate otherwise." Hicks v. Miranda, 422 U.S. 332, 344 (1975).
>
> Here, several doctrinal developments in the Court's analysis of both the Equal Protection Clause and the Due Process Clause as they apply to gay men and lesbians demonstrate that the Court's summary dismissal in Baker has little if any precedential effect today. Not only was Baker decided before the Supreme Court held that sex is a quasi-suspect classification, see Craig v. Boren, 429 U.S. 190, 197 (1976); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality op.), but also before the Court recognized that the Constitution protects individuals from discrimination on the basis of sexual orientation. See Romer v. Evans, 517 U.S. 620, 635–636 (1996). Moreover, Baker was decided before the Supreme Court held in Lawrence v. Texas that it was unconstitutional for a state to "demean [the] existence [of gay men and lesbians] or

unconstitutional, the Windsor Court acknowledged that:

> The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See Williams v. North Carolina, 317 U. S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). The definition of

---

control their destiny by making their private sexual conduct a crime." 539 U.S. 558, 578 (2003). As discussed below, the Supreme Courts decision in Lawrence removes a justification that states could formerly cite as a reason to prohibit same-sex marriage.

* * *

As discussed above, the Court's decision in Windsor does not answer the question presented here, but its reasoning is nevertheless highly relevant and is therefore a significant doctrinal development. Importantly, the Windsor Court foresaw that its ruling would precede a number of lawsuits in state and lower federal courts raising the question of a state's ability to prohibit same-sex marriage, a fact that was noted by two dissenting justices. . . . It is also notable that while the Court declined to reach the merits in Hollingsworth v. Perry because the petitioners lacked standing to pursue the appeal, the Court did not dismiss the case outright for lack of a substantial federal question. See —— U.S. ——, 133 S.Ct. 2652 (2013). Given the Supreme Court's disposition of both Windsor and Perry, the court finds that there is no longer any doubt that the issue currently before the court in this lawsuit presents a substantial question of federal law.

The Court finds this reasoning persuasive and adopts the above quoted passage in full. Baker no longer has any precedential effect.

> marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." Ibid.

Id. at 2691. The state defendants gloss over one important caveat. While the justices recognized the state's expansive power in the realm of domestic relations, they also noted that this power has its limits. Writing for the majority, Justice Kennedy stated that domestic relations "laws defining and regulating marriage, of course, must respect the constitutional rights of persons . . . but, subject to those guarantees, regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the states," id. (citing Loving) (internal quotations omitted), and that "[t]he states' interest in defining and regulating the marital relation [is] subject to constitutional guarantees . . ." Id. at 2692. These statements are not merely surplusage, and as one district astutely remarked, "[a] citation to Loving is a disclaimer of enormous proportion." Bishop, 2014 U.S. Dist. LEXIS 4374, at *66.

Loving has profound implications for this litigation. In that case, the Supreme Court overturned Virginia's anti-miscegenation statutes prohibiting interracial marriage because they violated substantive due process and equal protection. In doing so, the Court rejected Virginia's argument that "under the Constitution the regulation and control of marital and family relationships are reserved to the States." Kitchen, 2013 U.S. Dist. LEXIS 179331, at *83-84 (citation omitted). This position, which the state defendants advance

again in the present case, is just as ineffectual now as it was in Loving. Taken together, both the Windsor and Loving decisions stand for the proposition that, without some overriding legitimate interest, the state cannot use its domestic relations authority to legislate families out of existence. Having failed to establish such an interest in the context of same-sex marriage, the MMA cannot stand.

Further, the Court rejects the contention that Michigan's traditional definition of marriage possesses a heightened air of legitimacy because it was approved by voter referendum. The popular origin of the MMA does nothing to insulate the provision from constitutional scrutiny. As Justice Robert H. Jackson once wrote,

> [t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943); see e.g. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n. 2 (1975) (stating that the right to equal protection is incorporated within the Fifth Amendment's Due Process Clause). The Court is not aware of any legal authority that entitles a ballot-approved measure to special deference in the

event it raises a constitutional question. On the contrary,

> the Supreme Court has clearly stated that if . . . an enactment violates the U.S. Constitution - whether passed by the people or their representatives - judicial review is necessary to preserve the rule of law . . . [t]he electorate cannot order a violation of the Due Process or Equal Protection Clauses by referendum or otherwise, just as the state may not avoid their application by deferring to the wishes or objections of its citizens.

Obergefell v. Wymyslo, No. 13-0501, 2013 U.S. Dist. LEXIS 179550, at *27-28 (S.D. Ohio Dec. 23, 2013) (citing Cleburne, 473 U.S. at 448). In view of the foregoing, the state's domestic relations authority cannot trump federal constitutional limitations.

IV. Conclusion

In attempting to define this case as a challenge to "the will of the people," Tr. 2/25/14 p. 40, state defendants lost sight of what this case is truly about: people. No court record of this proceeding could ever fully convey the personal sacrifice of these two plaintiffs who seek to ensure that the state may no longer impair the rights of their children and the thousands of others now being raised by same-sex couples. It is the Court's fervent hope that these children will grow up "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Windsor, 133 S. Ct. at 2694. Today's decision is a step in that direction, and affirms the enduring principle

that regardless of whoever finds favor in the eyes of the most recent majority, the guarantee of equal protection must prevail.

Accordingly,

IT IS HEREBY DECLARED that Article I, § 25 of the Michigan Constitution and its implementing statutes are unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

IT IS FURTHER ORDERED that the State of Michigan is enjoined from enforcing Article I, § 25 of the Michigan Constitution and its implementing statutes.

S/ Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE

Dated: March 21, 2014
Detroit, Michigan

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 12-CV-10285

HON. BERNARD A. FRIEDMAN

[Filed March 21, 2014]

APRIL DEBOER, individually and as parent and next friend of N.D.-R, R.D.-R., and J.D.-R, minors, and JAYNE ROWSE, individually and as parent and next friend of N.D.-R, R.D.-R., and J.D.-R, minors,

Plaintiffs,

vs.

RICHARD SNYDER, in his official capacity as Governor of the State of Michigan, and BILL SCHUETTE, in his official capacity as Michigan Attorney General,

Defendants.

JUDGMENT

The Court in this matter has issued its Findings of Fact and Conclusions of Law. In accordance therewith,

IT IS ORDERED AND ADJUDGED that judgment be and is hereby granted for plaintiffs and against defendants.

IT IS FURTHER ORDERED AND ADJUDGED that defendants are hereby permanently enjoined from enforcing the Michigan Marriage Amendment and its implementing statutes, as they conflict with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

DAVID J. WEAVER
CLERK OF COURT

By: Carol L. Mullins_____
Deputy Clerk

March 21, 2014
Approved: s/ Bernard A. Friedman_____
BERNARD A. FRIEDMAN
SENIOR U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14-1341

[Filed November 6, 2014]

APRIL DEBOER, et al., Plaintiffs-Appellees,	)
v.	)
RICHARD SNYDER, Governor, State of Michigan, in his official capacity, et al., Defendants-Appellants.	)

Before: DAUGHTREY, SUTTON and COOK, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

SUPPORT BRIEF

Supreme Court, U.S.
FILED
NOV 24 2014
OFFICE OF THE CLERK

No. 14-571

In the Supreme Court of the United States

APRIL DEBOER, ET AL., PETITIONERS

v.

RICHARD SNYDER, GOVERNOR, STATE OF MICHIGAN, IN HIS OFFICIAL CAPACITY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourteenth Amendment to the U.S. Constitution preclude the people of a State from defining marriage as the union of one man and one woman?

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INTRODUCTION

This case comes down to two words: who decides. The history of our democracy demonstrates the wisdom of allowing the people to decide important issues at the ballot box, rather than ceding those decisions to unelected judges. With respect to how to define marriage, the admonition of the Court's plurality opinion in *Schuette* v. *Coalition to Defend Affirmative Action* is worth repeating here: "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." 134 S. Ct. 1623, 1637 (2014). And that principle is exactly what the Sixth Circuit recognized below, holding that the issue of how to define marriage must be left where "it has been since the founding: the hands of state voters." Pet. App. 29.

Over the past two decades, the American people have discussed and debated this very topic. These discussions have culminated with the citizens of almost every State addressing the issue through the democratic process, either through direct democracy or elected legislatures, in either state constitutions or statutes. Millions of Americans have expressed their views on the issue by exercising their right to vote—a right fundamental to our constitutional system.

Early in this dialogue, state courts in Hawaii and Massachusetts took the issue out of voters' hands. Since then, the citizens of a majority of the States—30, all told—have amended their state constitutions to define marriage as only between a man and a woman, thereby preventing state judges from

overriding the democratic process. Other States addressed the issue by statute. And, within those States and others, the debate has continued. In the last five years, for example, voters in 12 States and the District of Columbia have voted to redefine marriage to include same-sex couples.

But some federal courts have recently halted this ongoing exercise of self-governance on the theory that the people have already resolved the issue by passing the Fourteenth Amendment in 1868. These courts—relying on conflicting rationales—struck down democratically enacted laws in 19 States.

Specifically, four circuits (the Fourth, Seventh, Ninth, and Tenth Circuits) and a Pennsylvania district court have struck down the statutes of four States (Pennsylvania, Virginia, West Virginia, and Wyoming) and the constitutional amendments of 15 more (Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, North Carolina, Oklahoma, Oregon, South Carolina, Utah, Virginia, and Wisconsin). While disagreeing on the means, they have reached the same end and created a new constitutional right: a right to same-sex marriage.

In contrast, the Sixth Circuit recognized that democratic processes and our constitutional structure "may be the most reliable, liberty-assuring guarantees of our system of government." Pet. App. 14. Concluding that none of the plaintiffs' arguments made the case for constitutionalizing the definition of marriage, the court of appeals left the issue with the people at the state level. And, acknowledging that a "dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage

shared not long ago by every society in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of States," it concluded that rational bases existed for the definition. Pet. App. 32. It thus joined the Eighth Circuit in upholding a state marriage amendment.

Michigan fully recognizes that the state democratic process must yield if the majority adopts a policy that conflicts with the U.S. Constitution. But this is not such a case. The Constitution does not define marriage; rather it leaves that task to voters at the state level. The right asserted here—to marry someone of the same sex—does not qualify as a fundamental right under this Court's substantive-due-process test, which requires a right to be "objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington* v. *Glucksberg*, 521 U.S. 702, 720–21 (1997). Same-sex marriage does not have those necessary deep historical roots, as this Court recognized last year in *United States* v. *Windsor*: "It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two person of the same sex might" marry. 133 S. Ct. 2675, 2689 (2013). As the Sixth Circuit correctly held, "[n]ot one of the plaintiffs' theories" supports taking this issue away from the voters.

Given the importance of the issue—who decides important issues in our constitutional democracy—and the split among the circuits that allows the citizens of some States, but not others, to vote on the definition of marriage, Michigan does not oppose review by this Court. Instead, it asks this Court to affirm.

STATEMENT OF THE CASE

A. The history of marriage in Michigan

Michigan's marriage law dates back to its days as a territory. From the beginning, marriage has been the union of one man and one woman. E.g., 1 *Laws of the Territory of Michigan* 30–32 (W.S. George & Co. 1871) (1805 statute using the terms "wife" and "husband" and "man" and "woman"); contra Pet. 7 (asserting that "[f]or many years prior to 1996, Michigan law defined eligibility to marry without reference to gender"). To be married, early statutes required "that the parties solemnly declare . . . that they take each other as husband and wife." MICH. REV. STAT. 1846, Ch. 83, § 9. This was consistent with the fact that "[t]he law of every common-law state, and indeed of every European and American state, deals with marriage as a voluntary union of a man and a woman." JOSEPH H. BEALE ET AL., *Marriage and the Domicil*, 44 Harv. L. Rev. 501, 504 (1931).

The people of Michigan reaffirmed this and other aspects of marriage in 1996: "Marriage is inherently a unique relationship between a man and a woman." MICH. COMP. LAWS § 551.1. As the statutes explain, "[a]s a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children." *Id.*

In 2004, one year after Massachusetts' highest court struck down that State's marriage laws, more than 2.7 million Michigan voters reaffirmed this

understanding of marriage by enacting a constitutional amendment defining marriage: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." MICH. CONST. art. I, § 25.

B. The plaintiffs

April DeBoer and Jayne Rowse are an unmarried, same-sex couple residing in Hazel Park, Michigan. They have lived together for eight years. Both are nurses and state-licensed foster parents. Each has adopted children with special medical needs: DeBoer has adopted child R, and Rowse has adopted both N and J. Pet. App. 105.

C. District-court proceedings

This case began as a challenge to Michigan's adoption laws. But when the district court concluded that Michigan's adoption laws had not caused any injury to the plaintiffs, the court did not dismiss the complaint for lack of standing. Instead, it "invit[ed] plaintiffs to seek leave to amend their complaint to include a challenge to [Michigan's marriage amendment]." Pet. App. 106.

After the plaintiffs accepted the court's invitation by adding a second count to their complaint that challenged the marriage amendment as violating both due process and equal protection, the court denied the parties' cross motions for summary judgment. (Op. & Order, RE 89, Page ID 2003.) The court recognized both that "[t]he underlying facts are not in dispute" and that under rational-basis review

" '[t]he government has no obligation to produce evidence to support the rationality of its . . . [imposed] classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data.' " (Op. & Order, RE 89, Page ID 1997 & 2000.) The court nonetheless concluded that "a triable issue of fact exists regarding whether the alleged rationales for the [Michigan marriage amendment] serve a legitimate state interest." (Op. & Order RE 89, Page ID 2000.) The trial on whether the voters of Michigan had a rational basis for defining marriage as between one man and one woman lasted nine days and focused on expert witnesses on social science.

The district court issued its opinion on Friday, March 21, 2014. Treating the question of rational basis as hinging on factual disputes that could be resolved in a courtroom, the court concluded that the testimony of every one of the plaintiffs' expert witnesses was credible and gave weight to each. Pet. App. 109–16 (Brodzinsky, a psychologist; Rosenfeld, a sociologist; Sankaran, a law professor; Gates, a demographer; Cott, a historian; and Brown, a county clerk). In contrast, the court decided that not one of the State's witnesses gave credible testimony that was entitled to any weight. Pet. App. 116–23 (Regnerus, a sociologist; Marks, a family studies professor; Price, an economist; and Allen, an economist).

Following trial, the district court struck down Michigan's marriage definition. In so doing, the court recognized that it was not possible to make any finding that the voters acted out of animus: "Since

the Court is unable [to] discern the intentions of each individual voter who cast their ballot in favor of the measure, it . . . cannot ascribe such motivations to the approximately 2.7 million voters who approved the measure." Pet. App. 133.

In its conclusions of law, the district court recognized that it was supposed to apply "the most deferential level of scrutiny, i.e., rational basis review," a level of review under which the government has "'no obligation to produce evidence'" and under which the plaintiff can prevail only if "'the government's actions were irrational.'" Pet. App. 126. The court then concluded that none of the State's suggestions for why voters might have enacted the amendment provided a rational basis for the amendment. Pet. App. 127.

The district court did not grant the State's request for a stay, even though this Court had already reversed a district court and the Tenth Circuit for denying a stay in similar circumstances. Order, *Herbert* v. *Kitchen*, No. 13A687 (U.S. Jan. 6, 2014). As a result, county clerks across Michigan issued marriage licenses to more than 300 individuals on Saturday, March 22, 2014, the day after the opinion—a process that was halted when the Sixth Circuit granted the State's emergency motion for a stay pending appeal.

D. The Sixth Circuit's decision

The Sixth Circuit reversed, with Judges Sutton and Cook in the majority and Judge Daughtrey dissenting. At the outset, the majority recognized that "[t]his is a case about change—and how best to

handle it under the United States Constitution." Pet. App. 13. The court explained that our constitutional structure leaves the question of how to define marriage not to the federal courts, but "to the less expedient, but usually reliable, work of the state democratic processes." Pet. App. 16.

Writing for the majority, Judge Sutton first considered whether a lower court is always bound by an on-point holding of this Court, even if the holding is a summary disposition. Citing this Court's instruction in *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977), that summary dispositions "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions," the majority concluded it was bound by *Baker* v. *Nelson*, 409 U.S. 810 (1972). Pet. App. 25–26. Because *Baker* resolved the same issues this case does, the majority concluded it had "no license to engage in a guessing game about whether the Court will change its mind or, more aggressively, to assume authority to overrule *Baker* ourselves." Pet. App. 24.

The court of appeals then examined the question through a number of lenses—"originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning"—before concluding that "[n]ot one of the plaintiffs' theories . . . makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters." Pet. App. 28–29.

Starting with original meaning, the Sixth Circuit reasoned that people who ratified the Fourteenth

Amendment would not have understood it "to require the States to change the definition of marriage." Pet. App. 30. And although the people did not create a federalized constitutional marriage definition in 1868, they remain free to use "the agreed-upon mechanisms"—that is, the amendment process—to change the U.S. Constitution in the future. Pet. App. 29.

Turning to rational-basis review, the court recognized that governments have an interest in the definition of marriage "not to regulate love," but out of concern for "the intended and unintended effects of male-female intercourse." Pet. App. 32. Given this legitimate interest, the court concluded that at least two rational bases support Michigan's definition of marriage. First, "[b]y creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring." Pet. App. 34–35. "That does not convict the States of irrationality, only of awareness of the biological reality that couples of the same sex do not have children the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring." Pet. App. 35.

Second, the court recognized that it is rational "to wait and see before changing a norm that our society (like all others) has accepted for centuries." Pet. App. 35. This caution is not simply "preserving tradition for its own sake." Pet. App. 35. Keeping in mind that Michigan enacted its state constitutional amendment just one year after Massachusetts'

highest court introduced same-sex marriage to the United States, it cannot be said that the voters acted irrationally by "sticking with the seen benefits of thousands of years of adherence to the traditional definition of marriage in the face of one year of experience with a new definition." Pet. App. 35–36.

In accepting these reasons as rational, the majority acknowledged that marriage laws include inconsistencies, but explained that other views of marriage, including the plaintiffs' definition of marriage based primarily on love and commitment, suffer from "line-drawing problems" of their own and thus would fall too if the existence of under-inclusion and over-inclusion problems were sufficient to make a law irrational. Pet. App. 37.

Like the district court, the Sixth Circuit also concluded that the state marriage amendments were not motivated by animus. The amendments merely "codified a long-existing, widely held social norm already reflected in state law." Pet. App. 40. "[I]f there was one concern animating the initiatives, it was the fear that the courts would seize control over an issue that people of good faith care deeply about." Pet. App. 41. The court concluded that it is just as "unfair to paint the proponents of the measures as a monolithic group of hate-mongers" as it is "to paint the opponents as a monolithic group trying to undo American families." Pet. App. 44. The court refused to paint the people of Michigan as acting out of animus, because " '[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on

decent and rational grounds.' " Pet. App. 42 (quoting *Schuette*, 134 S. Ct. at 1637).

As for substantive due process, the majority reiterated this Court's test: whether the asserted right is " 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " Pet. App. 46 (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations omitted)). And it concluded that same-sex marriage does not satisfy this test because "[t]he first state high court to redefine marriage to include gay couples did not do so until 2003." Pet. App. 46. Nor, the court reasoned, did *Loving* v. *Virginia*, 388 U.S. 1 (1967), change this analysis, as evidenced by the fact that, just five years after *Loving*, this Court in *Baker* v. *Nelson* rejected the same due-process argument the plaintiffs make here. Pet. App. 47.

The court of appeals also declined to create a new suspect class based on sexual orientation, noting that "[t]he Supreme Court has never held that legislative classifications based on sexual orientation receive heightened review." Pet. App. 50. The court also noted that while "gay individuals have experienced prejudice in this country," "the institution of marriage arose independently of this record of discrimination," which shows that "[t]he usual leap from history of discrimination to intensification of judicial review does not work." Pet. App. 51.

Finally, the court concluded that even if it were to take into account "evolving moral and policy considerations" under the "living constitution"

theory, the focus would be "on evolution in *society's* values, not evolution in *judges'* values." Pet. App. 57. Because the objective evidence of society's values can be seen in the fact that, "[f]reed of federal-court intervention, thirty-one States would continue to define marriage" as only between a man and a woman, the majority concluded it had no right "to say that societal values, as opposed to judicial values, have evolved toward agreement in favor of same-sex marriage." Pet. App. 57.

REASONS FOR GRANTING THE PETITION

I. The circuits are split on whether States may define marriage as only between a man and a woman without violating the Fourteenth Amendment.

Six circuits have addressed whether the Fourteenth Amendment prevents States from defining marriage as between a man and a woman. Two (the Sixth and Eighth Circuits) have concluded it does not, thereby allowing the States of Kentucky, Michigan, Ohio, Tennessee, Arkansas, Missouri, Nebraska, North Dakota, and South Dakota to retain their marriage amendments. In contrast, four (the Fourth, Seventh, Ninth, and Tenth Circuits) have concluded it does, thereby invalidating the laws of Alaska, Arizona, California, West Virginia, Indiana, Colorado, Idaho, Kansas, Nevada, North Carolina, Montana, Oklahoma, Oregon, South Carolina, Utah, Virginia, Wisconsin, and Wyoming.

In addition to the Sixth Circuit's decision in this case, the Eighth Circuit has also rejected the contention that defining marriage as between a man

and a woman violates the Equal Protection Clause. In *Citizens for Equal Protection* v. *Bruning*, 455 F.3d 859 (8th Cir. 2009), the plaintiffs alleged that Nebraska's marriage amendment violated the Equal Protection Clause. *Id.* at 863. Noting that "the Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes," the Eighth Circuit declined to apply heightened scrutiny. *Id.* at 866. Recognizing that "[r]ational-basis review is highly deferential to . . . the electorate that directly adopted" Nebraska's marriage amendment, and that "the institution of marriage has always been, in our federal system, the predominant concern of state government," the court upheld the amendment. *Id.* at 867.

The Seventh and Ninth Circuits reached the opposite conclusion on the equal-protection issue. The Seventh Circuit, eschewing what it called "the conventional approach" to equal-protection analysis, *Baskin* v. *Bogan*, 766 F.3d 648, 656 (7th Cir. 2014), applied heightened scrutiny based on its conclusion that sexual orientation is a suspect class. *Id.* at 654 (treating the amendment as a classification that "proceeds *along suspect lines*"); *id.* at 656 (discussing discrimination "against a protected class" and asserting that "[t]he challenged laws discriminate against a minority defined by an immutable characteristic"). The court's discussion relied on policy considerations ranging from the court's view of science (how it thought evolution might have led to same-sex attraction, *id.* at 657–58) to the court's view of morality (that moral concerns should be limited to "tangible, secular, material" harms, *id.* at 669 (citing John Stuart Mill's harm principle)). By

applying heightened scrutiny, the Seventh Circuit was able to deviate from the rule that a classification can survive rational-basis review even if it is "both underinclusive and overinclusive," *Vance* v. *Bradley*, 440 U.S. 93, 108–09 (1979), and thus condemn Indiana's and Wisconsin's laws because it did not view them as sufficiently narrowly tailored. E.g., *Baskin*, 766 F.3d at 655, 656, 661, 672. The Seventh Circuit expressly "avoid[ed] engaging with the plaintiffs' further argument that the states' prohibition of same-sex marriage violates a fundamental right protected by the due process clause of the Fourteenth Amendment." *Id.* at 656–57.

The Ninth Circuit also applied heightened scrutiny in its equal-protection analysis, striking down Nevada's and Idaho's laws. *Latta* v. *Otter*, --- F.3d ---, 2014 WL 4977682, at *4 (9th Cir. 2014). The majority's theory was that state marriage laws defining marriage as only between a man and a woman discriminated based on sexual orientation, and that "sexual orientation" is a protected class. *Id.* Judge Reinhardt, the author of the majority opinion, concurred separately to say that he would also hold that the fundamental right to marriage includes "the right to marry an individual of one's choice." *Id.* at *11. The other two panel members did not endorse his fundamental-rights analysis. Similarly, Judge Berzon wrote a lone concurrence to express her view that the laws classify on the basis of sex and should be invalidated on that additional ground. *Id.* at *14.

As for fundamental rights under substantive due process, the Fourth and Tenth Circuits have reached holdings opposite of the Sixth Circuit. In *Bostic* v.

Schaefer, 760 F.3d 352 (4th Cir. 2014), the Fourth Circuit concluded that "*Glucksberg*'s analysis applies only when courts consider whether to recognize new fundamental rights," and that "the right to same-sex marriage" is not new, because it is part of the right to marry. *Id.* at 376. Under this reasoning, the court was free to set aside the " 'guideposts for responsible decisionmaking' "—i.e., "this Nation's history and tradition"—that this Court has marked out in the area of substantive due process, *Glucksberg*, 521 U.S. at 720, 721. Using this freedom, the Fourth Circuit majority took an existing fundamental right (the right to marry) and redefined that right. *Bostic*, 760 F.3d at 376. Having set aside the prerequisites of history and tradition to find a fundamental right to same-sex marriage, the Fourth Circuit then applied strict scrutiny and concluded that no compelling interest—including, ironically, history—supported maintaining the definition of marriage. *Id.* at 384. It accordingly struck down, over a dissent from Judge Niemeyer, Virginia's marriage laws. *Id.* The majority did not conclude that the laws violated equal protection independent of the fundamental-rights analysis.

In *Kitchen* v. *Herbert*, 755 F.3d 1193 (10th Cir. 2014), the Tenth Circuit similarly concluded that Utah's marriage laws violated the fundamental right to marry. Like the Fourth Circuit, the Tenth Circuit reached this outcome by redefining the fundamental right at issue, the right to marry, as the right to marry the person of one's choice. *Id.* at 1215. The court also reasoned that "in describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual

exercising the right." *Id.* This reasoning has no limiting principle; it would eliminate other components of state marriage laws, because each requirement could be challenged by members of the affected classes. Further, as Judge Kelly explained in his partial dissent, redefining marriage as a right to marry the person of one's choice ignores the fact that the right to marry as discussed by the Supreme Court was "a right with objective meaning and contours"—contours derived from state law, including the fact that "for centuries 'marriage' has been universally understood to require two persons of opposite gender." *Id.* at 1234. Applying strict scrutiny, the Tenth Circuit struck down Utah's laws as insufficiently narrowly tailored. *Id.* at 1218, 1219, 1227. The Tenth Circuit did not conclude that the laws failed rational-basis review or that the laws should be subject to heightened scrutiny because of any suspect classification.

In a related case challenging Oklahoma's marriage laws, Judge Holmes, who was part of the *Kitchen* majority, concurred specially to explain that state marriage laws do not show the type of animus this Court has found to be sufficient to invalidate a law. *Bishop* v. *Smith*, 760 F.3d 1070, 1105 (10th Cir. 2014) (Holmes, J., concurring). For example, he noted that the marriage laws are far from the type of "unprecedented" law this Court invalidated in *Romer* v. *Evans*, 517 U.S. 620, 633 (1996); quite the opposite, "they are actually as deeply rooted in precedent as any rule could be." *Bishop*, 760 F.3d at 1105 (Holmes, J., concurring). They are also unlike the Defense of Marriage Act that this Court invalidated in *United States* v. *Windsor*, 133 S. Ct.

2675 (2013), where animus could be inferred from the fact that the federal government "veered sharply" from the usual deference it gave to state marriage laws. *Bishop*, 760 F.3d at 1108 (Holmes, J., concurring). But, when the subject of the challenge is a state law, "those federalism interests 'come into play on the other side of the board.'" *Id.* (quoting *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting)).

In the end, there are multiple circuit splits, but the majority positions are not what the conventional wisdom portrays it to be. A majority of circuits have rejected each of the plaintiffs' lines of argument. Of the five circuits to consider the fundamental-rights argument, a majority of three (the Sixth, Seventh, and Ninth Circuits) has *declined* to accept the argument that there is a substantive-due-process right to same-sex marriage. Accord Pet. 14. And of the six circuits to consider the equal-protection argument, a majority of four (the Fourth, Sixth, Eighth, and Tenth Circuits) has *declined* to accept the argument that a state marriage definition fails rational-basis review or amounts to discrimination against a suspect class. Accord Pet. 14–15. In short, the circuits that have overridden democratically enacted state laws cannot agree on a constitutional theory to support their decisions.

Only this Court can resolve these deep conflicts among the circuits. Certiorari is warranted.

II. The Sixth Circuit's decision was correct.

A. Same-sex marriage does not qualify as a fundamental right under this Court's test because it is not deeply rooted in our Nation's history.

We as a country have tied our own hands by removing certain issues from the political process. Some rights are so important that we have enshrined them in the Bill of Rights. *W. Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). Some rights, even though not spelled out in the Constitution, are nonetheless so fundamental that they too cannot be impaired by Congress or by a State. To qualify for this latter fundamental-rights category, this Court has required the right in question to be so "objectively, 'deeply rooted in this Nation's history and tradition,' " and "so rooted in the traditions and conscience of our people as to be ranked as fundamental" that they are " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *Glucksberg*, 521 U.S. at 720–21 (citations omitted).

Efforts to fit same-sex marriage into either category fall short. Same-sex marriage is not a topic the people have expressly addressed in the U.S. Constitution, thereby resolving it through the democratic process. Nor is it a right that is so deeply

rooted in our Nation's history and tradition that it may be deemed a fundamental right.

This Court addressed the latter point in *Windsor*. The Court contrasted the history of same-sex marriage with the history of marriage generally, and recognized that only marriage between a man and a woman has deep historical roots within our Nation. As to same-sex marriage, this Court observed that "[i]t seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might" marry. *Windsor*, 133 S. Ct. at 2689, 2690; accord *Hernandez* v. *Robles*, 7 N.Y.3d 338, 361 (2006) (plurality) ("Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex."). And as to marriage, this Court in *Windsor* specifically observed that "[t]he limitation of lawful marriage to heterosexual couples" had "for centuries . . . been deemed both necessary and fundamental." *Id.* at 2689. If the limitation itself has historically been deemed fundamental to what marriage is, it cannot be true that marriage without the limitation qualifies as a fundamental right.

This ties back into the reason that rights must "be deeply rooted in our legal tradition" to be recognized under a substantive-due-process theory. The objective requirement of historical roots protects democracy by "rein[ing] in" the necessarily "subjective elements" of substantive-due-process review, *Glucksberg*, 521 U.S. at 722, so that rights will be recognized through the democratic process,

rather than being created by federal courts. See also *id.* at 723 (rejecting the argument that assisted suicide was a fundamental right because accepting that proposition would require "revers[ing] centuries of legal doctrine and practice, and strik[ing] down the considered policy choice of almost every State").

Applying this history-focused test, as the Sixth Circuit did, Pet. App. 46, is not "abdicat[ing]" a court's duty to the Constitution, any more than looking to the Constitution's text to see what rights it protects would be. Pet. 13; Pet. App. 102 (dissent asserting that courts have "the responsibility[ ] to right fundamental wrongs left excused by a majority of the electorate"). Quite the opposite, the Sixth Circuit fulfilled its duty by first asking whether the right asserted here was in fact a fundamental right under the Constitution. Pet. App. 46. Only after recognizing that same-sex marriage is not deeply embedded in U.S. history did it discuss the wisdom of trusting citizens (instead of federal courts) to address new social questions. Pet. App. 60–61 ("It is dangerous and demeaning to the citizenry to assume that *we*, and only *we*, can fairly understand the arguments for and against gay marriage.").

And when the Sixth Circuit cited the Civil Rights Act of 1964 to illustrate that "[r]ights need not be countermajoritarian to count," Pet. App. 60, it might have gone further. It might have observed that our most cherished minority-protecting rights arose by majority vote. It was the majority who chose, by amending the federal Constitution, to protect religious minorities, unpopular speakers, suspects, those charged with crimes, prisoners, racial

minorities, and women. U.S. CONST. amends. I, IV, V, VI, VIII, XIII, XIV, XV, & XIX.

B. As *Windsor* reaffirmed, marriage is an issue left to voters at the state level.

Windsor reaffirmed a basic point stretching back through this Court's jurisprudence: "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." 133 S. Ct. at 2689–90. *Windsor* specifically recognized that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' " *Id.* at 2691.

Indeed, when the *Windsor* majority overturned the federal Defense of Marriage Act, it highlighted the fact that DOMA was an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage," an aberration that conflicted with "the unquestioned authority of the States" over marriage. *Id.* at 2693. Marriages recognized as valid under state law (such as, in *Windsor*, under New York law) were entitled to be treated with dignity precisely because it was "a dignity conferred *by the States* in the exercise of their sovereign power." *Id.* (emphasis added). The Court's entire equal-protection analysis rests on this premise of state-conferred dignity. See *id.* ("the congressional purpose [was] to influence or interfere with state sovereign choices about who may be married"); *id.* at 2694 (recognizing that DOMA affected "state-sanctioned marriages" that "the State has sought to

dignify"); *id.* at 2695 ("marriages made lawful by the State"); *id.* at 2696 ("a status the State finds to be dignified and proper"); *id.* (referring to "those whom the State, by its marriage laws, sought to protect in personhood and dignity").

Applying this analysis requires respecting "state sovereign choices" and implicitly recognizes that State voters do in fact have a choice not to extend marriage to same-sex couples. Many "States in the exercise of their sovereign power" have chosen not to extend the boundaries of marriage. Other States have chosen to extend marriage to same-sex couples. If the people of a State choose the former—as the people of at least 30 States, including States as diverse as California, Texas, Oregon, Wisconsin, and Michigan have—their decision is also entitled to respect. Respecting the dignity of individuals in a democracy includes preserving not just their liberty to engage in private conduct, *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003), but also their liberty to engage in self-government. *Burson* v. *Freeman*, 504 U.S. 191, 214 (1992) (Kennedy, J., concurring) ("Voting is one of the most fundamental and cherished liberties in our democratic system of government.").

Justice Kennedy emphasized this point in the *Schuette* plurality opinion: "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." 134 S. Ct. at 1637. To put this in perspective, scores of millions of American voters across the country have voted to retain the definition of marriage as between one man and one woman. Respect for the dignity of these millions of

voters, who must be presumed to be "decent and rational," should make courts reluctant to conclude that support for maintaining the definition of marriage is irrational. After all, a decision by this Court that there is no rational basis for Michigan's voters to have defined marriage as they did necessarily means that not only Michigan's voters, but millions of other American citizens who have voted the same way, did not have among them a single conceivable rational basis for their votes.

Leaving issues of domestic law to the people at the state level also makes sense, as it allows the people to address social issues at a more local level. E.g., *Chandler* v. *Florida*, 449 U.S. 560, 579 (1981) (discussing States as laboratories of democracy). This freedom to vote has benefitted supporters of same-sex marriage, as they have succeeded in a number of States (in Maine, New Hampshire, Rhode Island, New York, Vermont, Delaware, Maryland, Illinois, Minnesota, Hawaii, and Washington) and in the District of Columbia in persuading voters through the democratic processes to redefine marriage to include same-sex relationships.

But if the people of a given State choose not to alter a foundational building block of society or have other good-faith reasons for wanting to retain marriage as is, they should also have the freedom to make those choices. And by leaving this issue to the democratic processes, rather than engraving it into the bedrock of constitutional law, e.g., *Roe* v. *Wade*, 410 U.S. 113 (1973), the people can review their decisions concerning the definition of marriage and look for ways to resolve the issue through

compromise and agreement, rather than through a judicial mandate.

The plurality opinion in *Schuette* is also consistent with how international tribunals have consistently analyzed the question of "who decides" how to define marriage. The vast majority of international tribunals have declined the invitation to judicially rewrite the longstanding marriage definition. The United Nations Human Rights Committee and the European Court of Human Rights have both rejected the argument that opposite-sex couples have a constitutional or human right to marry. *Herbert* v. *Kitchen*, No. 14-124, Amici Br. of 36 Comparative Law Scholars 16–17. Likewise, the Constitutional Tribunal of Chile, the French Constitutional Court, the German Federal Constitutional Court, the Italian Constitutional Court, and the Spanish Constitutional Court have all rejected constitutional claims for marriage between same-sex partners. *Id.* These international decisions uniformly rebuff the view of the judicial branch as a political institution that fashions new constitutional rights instead of deferring to the people acting through the democratic process.

C. Rational-basis review protects the democratic process by deferring to voters.

The rational-basis standard for reviewing democratically enacted laws is not a mere legal technicality. It is an important principle of judicial restraint and of separation of powers because it preserves the people's authority to govern themselves by making policy decisions. The Equal

Protection Clause "is not a license for courts to judge the wisdom, fairness, or logic of [the voters'] choices." *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). To the contrary, "the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent [a State's] interests should be pursued." *City of Cleburne, Tex.* v. *Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985).

That is why this Court has emphasized that "rational basis review" includes "a strong presumption of validity." *Beach Commc'ns*, 508 U.S. at 314–15. "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Id.* at 315 (internal quotation marks omitted). "This standard of review is a paradigm of judicial restraint." *Id.* at 314.

"These restraints on judicial review have added force 'where the legislature must necessarily engage in a process of line-drawing.' " *Beach Commc'ns*, 508 U.S. at 315 (quoting *U.S. R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980)). This added force applies here because setting the definition of marriage inherently requires line-drawing—lines such as age, number of participants, sex, consanguinity requirements, duration, and exclusivity. And "[e]ven if [a] classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature or people] is imperfect, it is nevertheless the rule that in [rational basis review]

'perfection is by no means required.'" *Vance* v. *Bradley*, 440 U.S. 93, 108–09 (1979) (quoting *Phillips Chemical Co.* v. *Dumas Sch. Dist.*, 361 U.S. 376, 385 (1960)).

D. The definition of marriage that has existed for centuries is not irrational or based on animus.

The first question in considering whether it is rational to define marriage as between one man and one woman is to ask what the State's interest in marriage is in the first place. Why is it that Michigan—like many other States and countries around the world, throughout all of history—has thought it important to have laws relating to marriage, while leaving other relationships, like friendships, free from restrictions?

While nearly all married people consider the emotional connection to be a critical component of marriage, emotional connection alone does not explain the State's interest. Friendships and relationships, after all, can also demonstrate love and commitment (think of a soldier diving on a grenade to save his squad), yet no State or country has shown any interest in passing laws about what it takes to enter into a friendship, or what it takes to end one. Friendships and relationships do not have age, gender, number, or consanguinity limits—siblings can be friends, and groups of people can be friends. If marriage, like other friendships, were only about an emotional connection—if it were only about love, commitment, and companionship—then it would be unclear what interest (other than moral approval of that friendship) the State might have.

The State's interest in marriage springs from a feature of opposite-sex intimate relationships that is biologically different from other relationships (including opposite-sex Platonic friendships and same-sex intimate relationships): the sexual union of a man and a woman produces something more than just an emotional relationship between two people—it produces the possibility, even the likelihood, of the creation of a new life.

In short, the State has an interest in encouraging men and women to marry because of its interest in stable relationships for the procreation and raising of children. As the Sixth Circuit recognized, the people could think that "a reasonable first concern of any society is the need" to address "the unique procreative possibilities" of opposite-sex relationships. Pet. App. 33. This point is well established in the law. E.g., *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (describing marriage as "fundamental to our very existence and survival"). And a number of reasons rationally support this interest.

1. Michigan voters could rationally have concluded that it is beneficial for children to be raised by both a mom and a dad.

It is certainly within the realm of rational speculation, see *Beach Commc'ns*, 508 U.S. at 315, to believe that children benefit from being raised by both a mother and a father. Men and women are different, moms and dad are not interchangeable, and having both a man and a woman as part of the parenting team could reasonably be thought to be a good idea.

This Court has recognized that " '[t]he two sexes are not fungible; a community made up exclusively of one is different from a community composed of both.' " *Ballard* v. *United States*, 329 U.S. 187, 193 (1946). In *Ballard*, in the context of whether women needed to be included on juries, the Court recognized that "a distinct quality is lost if either sex is excluded." *Id.* If this principle—that both men and women have important viewpoints and contributions to make—is true in the context of a jury pool, it is at least rational to conclude it is also true in the context of a family.

This is not to deny that same-sex couples can provide a caring, nurturing home. They obviously can. But it is also rational to think that moms and dads both might make important contributions to child raising. Even the plaintiffs' experts agree there are "average differences in the ways that mothers and fathers interact with their children." (2/25/14 Trial Tr., RE 143 (Part B) at 15 (Brodzinsky).) As another of the plaintiffs' experts acknowledged, "different sexes bring different contributions to parenting," and "there are different benefits to mothering versus fathering." (2/28/14 Trial Tr., RE 149 at 55 (Cott).) If, as the plaintiffs' experts thus concede, mothers and fathers provide different benefits, it is hard to see how it could be irrational to encourage a structure that brings both sets of benefits to children. A rational person, in short, might think that " '[t]he optimal situation for the child is to have both an involved mother and an involved father.' " *Bowen* v. *Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting).

2. It is rational to promote marriage in the setting where children biologically come from—the union of a man and a woman.

It is a basic fact of biology that children come from the sexual union of a man and a woman. Because sexual interactions between a man and a woman produce children, the State has an interest in encouraging long-term, committed relationships between men and women, so that any resulting children, including those from accidental pregnancies, will be raised by both their mom and their dad.

Marriage between opposite-sex couples advances this interest. Promoting marriage as an institution encourages long-term, committed relationships. Promoting marriage between a man and a woman thus increases the likelihood that when children are born, both of their biological parents will be there to care for them and to prepare them to be mature members of society. E.g., *Hernandez*, 7 N.Y.3d at 359 ("The Legislature . . . could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.").

Promoting marriage between opposite-sex couples is thus a rational means to advance the State's interest in caring for children, as a number of courts have recognized. E.g., *Citizens for Equal*

Protection v. *Bruning*, 455 F.3d 859, 867 (8th Cir. 2006) (recognizing that "defining marriage as the union of one man and one woman" is "rationally related to the government interest in 'steering procreation into marriage' "); *Andersen* v. *King Cnty.*, 158 Wash. 2d 1, 37 (2006) ("Under the highly deferential rational basis inquiry, encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples."). The voters' decision to tie marriage to opposite-sex couples, as it has been throughout all of human history, thus is not an act of bigotry or animus. It is a simple recognition that biology matters. *Nguyen* v. *INS*, 533 U.S. 53, 73 (2001) ("To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it.").

3. Citizens of a State might not have wished to alter a central building block of society without knowing more about its long-term impact.

Voters, even those who approve of same-sex relationships, might not wish to alter the definition of this time-tested building block of society. A rational voter might worry about the law of unintended consequences, and might conclude that there is some risk that changing the definition of marriage to remove its inherent connection to procreation might undermine the value of marriage in the long term as an institution for linking parents to their biological children. A rational person might think, for example, that "[t]he long-term consequences of this change are not now known and

are unlikely to be ascertainable for some time to come." *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting). "At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be." *Id.* at 2716.

Considering all of these points supporting defining marriage as between a man and a woman, reasonable people of good will might think it is at least debatable that this definition advances the State's interest in encouraging parents to stick together to care for and raise their children. And if it is at least debatable, then federal courts have no authority to overturn the people's legislative choice. *Beach Commc'ns*, 508 U.S. at 320 ("The assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the congressional choice from constitutional challenge.") (alteration in original).

* * *

As members of this Court recently observed, "[d]emocracy does not presume that some subjects are either too divisive or too profound for public debate." *Schuette*, 134 S. Ct. at 1638 (plurality). To the contrary, "the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates." *Id.* at 1649 (Breyer, J., concurring in judgment). "In short, the 'Constitution creates a democratic political system through which the people themselves must together find answers' to disagreements of this kind." *Id.* at

1650. When the Constitution is silent on an important issue of public debate, as is the case here, the issue should remain, where it has always been, with the people.

CONCLUSION

For these reasons, Michigan does not oppose the petition but rather urges this Court to affirm.

Respectfully submitted,

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